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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

MARVINELL BROWN -
PETITIONER

vs.

HOUSTON INDEPENDENT SCHOOL DISTRICT -
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **DUE PROCESS**-The district court failed to require at least minimum due process procedures and substantive due process when Respondent HISD referred and removed Petitioner Brown without notice and hearing. Failing to apply the 14th amendment toward the denial of Brown's property and liberty interest, the court mistakenly decided an ordered psychiatric examination as one condition to satisfy procedural due process. Unlike the district court, the Fifth Circuit did decide an hearing was required and mistakenly decided that conferences with Dr. Mattye Glass would satisfy the hearing requirement. The 5th Circuit failed to find due process violations when HISD failed to give Brown reasons before the referral to the Bureau of Health. Brown has been left hanging; the 5th Circuit did not put to rest the 'indefinite medical health leave' issue, but said Brown has not been terminated. Was this error?

2. **FREE SPEECH-FIRST AMENDMENT**-Court of Appeals decided the 1st Amendment issue using summary judgment. 5th Circuit concluded that Brown's protest to police was of a private nature and ruled her First Amendment claim was without legal merit. Was this error?

3. EQUITABLE TOLLING; RIGHT-TO-SUE

The 5th circuit failed to use equitable tolling by not considering that Brown's prior attorneys were experiencing problems that were out of Brown's control. Brown was not PRO SE when she received either of the right-to-sue letters. The district court failed to use equitable tolling by not acknowledging two right-to-sue letters dated September 6, 1988 and June 21, 1989. Considering only the September 1988 right-to-sue letter, the district court erred in granting summary judgment for the defendant because of a mistaken jurisdictional prerequisite. The lower courts failed to provide Brown the protection of Section 1983 even though she established constitutional violations. Was this error?

4. CREDIBILTY ASSESSMENTS FOR SUMMARY JUDGMENT

The lower courts had no authority to try and decide the 1st and 14th Amendment issues, conflicting psychiatric reports (credibility assessments), motive or intent issues. HISD accepted only one negligent psychiatric recommendation that called for Brown's removal from the classroom and rejected three more credible psychiatric recommendations for reinstatement. Was this error?

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OPINIONS BELOW

The unpublished written opinion of the Court of Appeals 5th Circuit appears in Appendix A; no hearing was permitted. The unpublished written opinion of the District Court for the Southern District of Texas appears in Appendix B to this Petition; no trial or hearing were permitted.

JURISDICTION

The judgment of the 5th Circuit Court of Appeals was entered on February 25, 1992, affirming summary judgment for the defendent, Houston Independent School District. A timely Petition for Rehearing En Banc was filed on March 6, 1992. The Court of Appeals' denial of the Petition for Rehearing En Banc was issued on March 31, 1992 and is set forth in Appendix C. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254 (1).

The 5th Circuit decision conflicts with other 5th Circuit cases, other court of appeals' decisions, and with applicable decisions of this Supreme Court. The lower courts failed to give Brown constitutional protection. Summary judgment is not for deciding issues involving the 1st and 14th Amendments, motive or intent, and credibility assessments.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment I to the United States Constitution is set forth in Appendix D.

Amendment XIV to the United States Constitution is set forth in Appendix D.

28 USC 1343 Section 1983; 28 USC 1331 Section 1981; 42 U.S.C.A. Section 2000e; Texas Education Codes

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under Title VII of the Civil Right Act of 1964, 1st & 14th Amendment violations, 42 U.S.C. § 2000e et. seq., 28 USC § 1343, Section 1981, and under 28 U.S.C. § 1331.

Marvinell Brown (Brown) was 'removed' and denied her property interest and liberty interest without even minimum due process procedures. Houston Independent School District (HISD) has refused to hold any hearings and placed Brown as of January 19, 1989 on indefinite medical leave which is essentially an unlawful way of terminating Brown without due process for a supposedly mental incapacity. (Brown called police to protest discriminatory

practices-five days later Brown was being referred for psychiatric evaluation) Petitioner Brown filed suit in the Southern District of Texas-Houston Division on March 20, 1989. The district court without an hearing and without defendant's answer to amended complaint filed memorandum and order granting the defendant's motion for summary judgment on January 17, 1991. Judge Harmon granted the defendants final summary judgment on May 28, 1991. Brown filed notice of appeal on 6/8/91. Without an hearing, the 5th Circuit accessed costs to Plaintiff Brown and affirmed the district court's judgment on February 25, 1992 and denied Rehearing En Banc on March 31, 1992.

REASONS FOR GRANTING THE WRIT

It is not the function of the trial judge, in ruling on a motion for summary judgment, to weigh evidence, assess credibility, or determine the most reasonable inference to be drawn from the evidence. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 106 S.Ct. 2505, 91 L. Ed. 2d 202 (1986) The 5th Circuit Court of Appeals and district court tried and decided the 1st & 14th Amendments issues, equitable tolling issue, conflicting psychiatric reports issue, and bias/partisan

issues without any hearings or any questions asked. This is not the American way. According to a New York Times article, "Most often, experts say, those who seek to bring such cases simply abandon the thought of getting any redress in the federal courts . . .What happens is that they end up not being able to enforce their rights" (Appendix H). Brown's constitutional rights have been violated. Brown is praying that this Supreme Court will grant her Petition For Writ of Certiorari for her sake and many others who seek justice in America.

Hopefully, justice and the America way are not in jeopardy. Brown is asking this Honorable Court to rescue this demise. Brown is asking this court to grant this petition to let the American people, the federal courts, and lawyers know that the American Constitution still reins. We, the American people, despite war, riots, AIDS, and injustices have hope and peace in knowing God is soverign. Brown is asking this Honorable Supreme Court for justice.

I. Due Process

"The district court failed to require at least minimum due process procedures and substantive due process when Respondent HISD referred and removed Petitioner Brown without notice and hearing. Failing to apply the 14th amendment toward the denial of Brown's property and liberty interest, the court mistakenly decided an ordered psychiatric examination as one condition to satisfy procedural

due process. Unlike the district court, the Fifth Circuit did decide an hearing was required and mistakenly decided that conferences with Dr. Mattye Glass would satisfy the hearing requirement. The 5th Circuit failed to find due process violations when HISD failed to give Brown reasons before the referral to the Bureau of Health. Brown has been left hanging; the 5th Circuit did not put to rest the 'indefinite medical health leave' issue."

Supreme court cases dictate that Marvinell Brown-tenured teacher had been entitled to procedural due process since HISD deprived Brown of "liberty" and "property". Board of Regents v. Roth, 408 U.S. 564; Perry v. Sinderman, 408 U.S. 593 (1972); Boddie v. Connecticut, 401 U.S. 371, 379; 91 S.Ct. 780,786 (1971); Cleveland Bd. of Educ. v Loudermill, 470 U.S. 532; 105 S.Ct. 1487 (1985). The record shows that Brown had a continuing contract with HISD. The 14th amendment provides that no state shall deprive any person of life, liberty or property without due process of law. HISD's 'removal' of Brown without pay or an hearing, effective March 1989, denied petitioner property without due process of law. Public employees facing suspension have interest qualifying for minimum due process procedures, but Brown did not even receive the minimum. Muscare v. Quinn, 620 F.2d 1212 (7th Cir. 1975). Brown was entitled to more than just minimum due process; full hearing(s) were required because of her being stigmatized.

Supreme and Appellate court cases stress the importance of assuring due process procedures are followed to avoid making 'erroneous' decisions. HISD was not concern about whether their actions were 'erroneous' ones; facts and evidence indicate that HISD's motive or intent was to get rid of this troublemaker using any means. With Brown being a 'good' tenured teacher (Tr. Vol. 2, pp. 262, 263), HISD had only one alternative-to use unlawful means. The record shows the reasons were manufactured and pretextual. (Appellant's, pg. 25). HISD did not investigate or hold hearings, because they knew the reasons were not true. HISD's motive was not to avoid errors; their intent was to unlawfully remove a tenured teacher.

The Seventh Circuit stated "before the initial deprivation of Vail's property interest--. . .he could have been provided a hearing, and the hearing would have provided him with a meaningful opportunity to guard against the risk of a wrongful or erroneous decision". Vail v. Bd. of Educ. of Paris Union Sch. Dist. No. 95, 706 F.2d 1449 (7th Cir. 1983).

The Supreme Court has stressed that tenured public school teacher, Brown, could not be dismissed without notice of the precipitating charges and a pretermination administrative hearing at which Brown would have been given the opportunity to challenge those charges. The Supreme Court requires this process to protect against a wrongful

discharge or an erroneous discharge. Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148 (1982); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694 (1972).

The Supreme Court stated "the stakes are too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal." Goldberg v. Kelly, 397 U.S. 254; 90 S.Ct. 1011 (1970).

The stakes were too high for Brown; she has lost her means of livelihood and reputation free of mental illness. The seriousness of the stigma HISD placed on Brown called for a full evidentary investigation and hearing.

The Supreme Court wrote

"the governmental interest in immediate termination does not outweigh the private interest in retaining employment and the risk of an erroneous termination." Cleveland Bd. of Educ. v Loudermill, 470 U.S. 532; 105 S.Ct. 1487 (1985).

Brown wrote "Due process could had prevented this mistake by Dr. Jones." (Tr. Vol. 1, p. 93). Why did HISD along with Dr. Jones handle Brown in a totalitarian fashion? Why were they fearful of hearings and due process? Hearings and due process would had brought out the truth. HISD's intent and motive was to terminate Brown using any means. Texas Education Codes (Appendix G) dictated due process for tenured teacher-Brown. The record does not show

where HISD had shown any compassion to this 'mentally ill' person; HISD even opposed Brown receiving unemployment benefits and told unemployed Brown to pay back an overpayment of over $1500. (Tr. Vol. 3, pp. 356, 460). HISD has acted maliciously.

DISTRICT COURT'S ANSWER

Failing to apply the 14th amendment toward the denial of property and liberty interest, the district court decided an ordered psychiatric examination as one condition to satisfy procedural due process and made no mention of 'hearing'.

"Following the notification and explanation Brown was given the opportunity to respond by undergoing a psychiatric examination by Dr. Mattye Glass, a psychiatrist of her own choosing. The conclusion of Dr. Glass was that medical health leave was appropriate and Brown should be restricted from the classroom. Accordingly, there being no genuine dispute as to the notice, explanation and opportunity to respond afforded Brown, the Court concludes that Brown received due process consistent with that mandated by Loudermill and HISD is entitled to summary judgment."(Tr. Vol. 1 pg. 49); (Appendix B, p. 7)

The district court's standard of due process fell short constitutionally. The 5th Circuit has defined minimum due process rights; one of those rights is "to be afforded a meaningful opportunity to be heard in his own defense within a reasonable time". Wells v. Dallas Independent School District 793 F.2d at 682 (1986); Levitt v. University of Texas

at El Paso 759 F.2d at 1228 (1985). Brown had no part or decision in seeing a psychiatrist; she was forced to go to a psychiatrist.

Using no authority, the district court expediously stated "Brown was given the opportunity to respond by undergoing a psychiatric examination". (Tr. Vol. 1, pg. 49). Yes, Loudermill does address the employee's opportunity right; this opportunity right is not to undergo a psychiatric examination as proposed by the district court. Supreme court cases show that employees have the right or **opportunity** to a hearing before being condemned to suffer a serious loss. The district court did not mention 'hearing' and even denied petitioner an evidentary hearing in district court. Loudermill's major holding is that tenured public employees are entitled to pretermination hearing: "who is entitled to a post-termination administrative hearing under state law must also be given a pre-termination opportunity to respond to the charges as a matter of due process" Cleveland Bd. of Educ. v Loudermill 470 US 542. "When interests involving liberty and property rights protected by the Fourteenth Amendment are implicated, the right to some kind of prior hearing is paramount" Board of

Regents v Roth, 408 US 564, 33 L Ed 2d 548. Loudermill concludes with the essential requirements of due process and holds:

"The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an **opportunity** to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." Cleveland Bd. of Educ. v Loudermill 470 U.S. at 542; 84 L Ed 2d at 504.

Senior Judge Skelton of the Fifth Circuit stated "I basically disapprove of the discharge or suspension of a government employee where the employee has not been granted an evidentary hearing with the rights of confrontation and cross-examination." Porter v. Califano, 592 F.2d at 786 (5th Cir. 1979).

FIFTH CIRCUIT'S ANSWER

The 5th Circuit apparently did not agree with the district court; but the 5th Circuit erred in determining a hearing was held. The record shows that neither HISD or the District Court used in their arguments the word 'hearing'. This makes sense; there was no hearing to address. But the Fifth Circuit is the only party that claimed there was a hearing; Brown stressed to the 5th Circuit that there was no hearing. (Petition For Rehearing In Banc, pp. 3, 4). Brown's first conference with Dr. Glass involved dialogue to determine whether a psychiatric examination was required; the second conference was merely for Brown to obtain

documentation and to leave a favorable psychiatric report. How could Brown's first conference with Dr. Glass be considered an hearing when Brown had not even been given reasons for the referral? How could Brown had prepared for a 'hearing' if she did not know the reasons for referral? The Fifth Circuit even acknowledged that Brown had not received the reasons for referral prior to referral. Court of Appeals wrote "After she was referred to Health Services but before she chose a psychiatrist, Ms. Brown was told of the reasons for the referral." (Appendix A, p. 4) Brown and her accuser, Principal Dr. Don Jones, never conversed about the reasons or anything after she protested to police. (Appellant's, p. 9).

All through the record, Brown alleged and proved arbitrary and capricous reasons for the issue of vagueness/nexus. (Appellant's, pp. 36, 37, 38). This Circuit failed to address this due process issue. HISD's reasons for the psychiatric referral were very vague and non-school related. (Appendix A, p. 3); (Tr. Vol. 1, p. 114; Vol. 2, pp. 266, 347) The 5th Circuit surprisingly accepted those pretextual reasons. This 5th Circuit required no substantial proof, paper trail, or nexus as the law requires to support the

validity of those 7 vague reasons. But in an earlier case, the 5th Circuit wrote "At the very least, these vague charges permit conflicting inferences as to whether Wells received sufficient notice of the charges against him. The entry of summary judgment was therefore in error." Wells v. Dallas Independent School District, 793 F.2d at 683. The unsupported and vague reasons are one reason Brown did not receive proper notice; summary judgment was error.

"Ms. Brown contends that the HISD violated her right to procedural due process under the Fourteenth Amendment. Under Cleveland Board of Education v. Loudermill, a public employee with a property right in continued employment is entitled to "notice and an opportunity to respond." 470 U.S. 532, 538, 546 (1985). The HISD does not dispute that Ms. Brown had a property right and was due some process; its argument is that she was given all the process she was due. We agree. Ms. Brown was given notice of the reasons for her referral and her subsequent placement on health leave. She was afforded the opportunity to give Dr. Glass her perspective on the events leading to the concern for her fitness to teach. She was allowed to present evidence to Dr. Glass, and we note that Dr. Glass acknowledged that if Ms. Brown pursued evaluation further, then a third psychiatric opinion might have been warranted. In short, she was given pretermination notice and hearing, and the HISD acted reasonably." (Appendix A-5th Cir, p. 8)

The record including Dr. Glass' affidavit shows that Brown and Glass met on two meaningful occasions. (Tr. Vol. 1, p. 152). Brown's first meeting with Dr. Glass on November 29, 1988 was to determine whether Brown should receive a psychiatric examination. (Tr. Vol. 1 pp. 31, 171, 173, 174,

& 269). Even in Dr. Glass minutes of November 29 conference, there is no hint that the particular meeting on that day was intended for 'hearing' purposes. She wrote "It has been recommended that Mrs. Brown receive a medical evaluation " (Tr. Vol. 1, p. 174). Brown's accuser, Principal Jones, wrote Dr. Glass about the proposed conference "Ms. Oliphant recommended that a memo be written to you requesting that you have a conference with Mrs. Brown to determine what course of action should be taken." (Tr. Vol. 1, p. 171) Again, the 5th Circuit misapprehended the record; this was not a hearing. Brown was even denied legal representation. (Tr. Vol. 2, p. 269). The procedures are to be advised of cause of termination or of charges to be heard in sufficient details to permit showing any error that may exist, to be advised of names and nature of testimony of witnesses against employee, to be afforded meaningful opportunity to be heard in his own defense within reasonable time and before tribunal that possesses some expertise and apparent impartiality toward the charges. Wells v. Dallas Independent School District, 793 F.2d at 680 (5th Cir. 1986) & Levitt v. University of Texas at El Paso, 759 F.2d at 1228(5th Cir. 1985). The 5th Circuit deviated from

the past 5th Circuit holdings on due process and hearings; therefore this petition should be allowed.

"What might be considered a pressing concern may be handled by the simple expedient of a leave of absence pending a reasonably scheduled hearing." Findeisen v. North East Independent School Dist., 749 F.2d 234 (1984).

A court has held that placement of a teacher on a health leave for mental problems without a hearing did involve a deprivation of a property interest. Doe v. Anker, 451 F.Supp. 242 (S.D. N.Y. 1978).

"that an individual be given an opportunity for a hearing before he is deprived of any significant property interest in his employment." Boddie v. Connecticut, 401 U.S. 371, 379; 91 S.Ct. 780, 786.

The two purposes for the 2nd conference were for Brown to give Dr. Wades' favorable recommendation and for Brown to obtain documents from her Bureau Health file. (Tr. Vol. 1 pp. 32,; Vol. 2 p. 255; Vol. 3 p. 565) Dr. Glass even stated the reason for 2nd conference: "Marvinell Brown was seen in the Bureau of School Health. . . for the purpose of reviewing material in her folder. . .I have a copy of a letter from John E. Wade, M.D." (Tr. Vol. 2, p. 255)

Her accuser-principal was not at any of the conferences. Surprisingly, the 5th Circuit accepted Dr. Glass, only her, as

representing the tribunal as required by Wells. Where is justice? The 5th Circuit failed to realize that a due process hearing would consist of a hearing by an examiner or tribunal who is impartial and who maintains an appearance of impartiality. Holley v Seminole County School District, 755 F2d 1492 (11th Cir 1985). How did the 5th Circuit support the holding that Brown's conferences with Dr. Glass were 'hearings'? Their holding demonstrates that an abuse of discretion has occurred and is contrary to Supreme Court and Fifth Circuit cases. Brown had asked for opportunity to obtain legal representation prior to referral; this shows another violation of due process overlooked by the 5th Circuit. (Tr. Vol. 1, p. 31, 269) (Appellant's p. 4).

CONTINUATION OF FIFTH CIRCUIT'S ANSWER

Throughout the record Brown established that she did not receive the reasons for referral until after the adverse action and after her 1st meeting with Dr. Glass. Even the 5th Circuit acknowledged that Brown was not given notice before referral. This Appeals Court wrote "After she was referred to Health Services but before she chose a psychiatrist, Ms. Brown was told of the reasons for the referral." (Appendix A, p. 4). This could not had been proper

notice. HISD forced the referral on Brown even before giving her the reasons. The reasons finally given for referral were vague, confusing, and lacking in substance. Therefore, Brown was also denied substantial due process.

"Ms. Brown was given notice of the reasons for her referral and her subsequent placement on health leave. She was afforded the opportunity to give Dr. Glass her perspective on the events leading to the concern for her fitness to teach. She was allowed to present evidence to Dr. Glass, and we note that Dr. Glass acknowledged that if Ms. Brown pursued evaluation further, then a third psychiatric opinion might have been warranted. In short, she was given pretermination notice and hearing, and the HISD acted reasonably." (Appendix A-5th Cir, p. 8)

Brown notified the district court that she was not given reasons for her being referred for a mental examination. She stated "Why did Jones fail to give Plaintiff a copy of the November 28 reasons (Exhibit 9) for referring her, instead he only gave her the letter stating she was being referred." (Tr. Vol. 2, pp. 237, 269, 270); Brown was never given the opportunity to defend herself against the late and manufactured reasons that were finally given to her by Dr. Glass. Brown was referred on November 28, 1988 and the record shows Brown had not yet received any reasons for adverse actions on December 5. (Tr. Vol. 2, p. 270).

Brown wrote

"I have not received any reason on why I am being sent. I have not received any written documentation on board policy.

I am being forced to do this, because I have been told my job is in jeopardy. I pray that God manifest Himself in this situation." Dr. Glass finally gave Brown oral reasons as indicated in the record. (Tr. Vol. 2, p. 178)." (Appellant's, p. 13).

The reasons given for psychiatric referral were so vague causing constitutional infirmity. The 5th Circuit put this issue to rest using summary judgment. This is error.

"These manufactured reasons were a pretext for an adverse action which was actually motivated by the Appellant-plaintiff's constitutionally protected speech. The reasons Principle Jones gave for referral were very vague and in need of explanation; Jones stated 7 behavior patterns manifested by Brown (Tr. Vol. 2, pp. 266, 347). For these 7 patterns, Jones failed to include dates, times, or witnesses. He does not substantiates any of the seven accusations. There is no written record or paper trail of these accusations; there is no history. Brown never signed a sheet indicating that she was told of deficiencies in her job performance. Strangely, none of the reasons relate to the educational process or to her students. The defendants failed to give a nexus. The seven 'strange' behavior patterns were clearly manufactured, pretextual, and subjective; his accusations had no substance. Brown and Jones never discussed these reasons. Brown has no idea how Jones manufactured 4 of the 7 patterns: (1) Explodes with administration-unprofessional behavior (2) Fears someone is going to harm her (4) Fears that she might lose control (5) Some days she appears to be alert and on others she appears to be detached. Brown successfully rebutted 3 of the seven behavior patterns as indicated in the record. (Tr. Vol. 1, p. 94; Vol. 2, p. 239, 347). Brown finally discovered what the (3) reason 'Refusal to be observed' meant when she discovered exhibit 14. (Tr. Vol. 2, p. 275). Irene Kerr wrote "Ms. Brown's refusal to allow the TTAS appraisal to go forward in her class" Brown objected to being observed at a time prohibited by TTAS; but there was no real problem. Brown was evaluated January 12 which was prohibited by TTA. (Tr. Vol. 2, p. 282). Mr. Skain and Brown finally agreed

on a date; her evaluation turned out very well. (Tr. Vol. 2, p. 277). None of her evaluators mentioned any problem with Brown's objection to being evaluated at a bad time; she received a 'clearly outstanding' rating. (Tr. Vol. 2, p. 262). Brown also successfully rebutted (6) 'Multiple incidents of the Panic button being pushed in her classroom'. Brown made it known to the District Court that something was wrong with the buzzard and not Brown. (Tr. Vol. 2, p. 239). Even Brown's students signed a paper stating that the buzzard would go off by itself; Brown never had the opportunity to let Jones know that something was wrong with the buzzard. (Tr. Vol. 2, p. 268). Finally, Brown and Jones never discussed reason (7) 'Unprofessional behavior - dialing 911 because of a poor assessment. She filed the complaint in Dr. Jones' and her name'. Brown made it clear to the District Court why she called the police-to protest discrimination. (Tr. Vol. 2, p. 272). The decision to refer and remove Brown was arbitrary, capricious, unsupported by fact or law. Sadly, there was no compliance with remediability requirements. Brown wrote to the court "Also, she was never warned, nor given an opportunity to improve, or a two week notice." (Tr. Vol. 1, p. 92). Brown remained in the classroom for a long length of time even after the initial referral. During that time, no one tried to assist Brown or made any attempt to remedy the 'deficiencies'. HISD found it convenient to remove Brown after she had completed preparing for semester exams. Note that there were not any remedies suggested that would keep Brown on the payroll until her 'problems' were resolved. Why didn't HISD place Brown in a non-teaching position until her 'deficiencies' were healed? Were there really any deficiencies?"(Appellant's, pp. 25, 26).

CONTINUATION OF FIFTH CIRCUIT ANSWER

"We understand that Ms. Brown would have liked to have been given the reasons for referral sooner, and would have preferred an earlier, more elaborate hearing. But notice and an opportunity to present her side to Dr. Glass were given before her salary payments were stopped and before she was terminated. As far as the record shows, in fact, Ms. Brown still has not been terminated. Even if we assume, for the sake or argument, that the Due Process Clause would be implicated by a cessation of salary payments

without formal termination, the minimal procedural requirements set out in Loudermill have been satisfied. "To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." Id. at 546."(Appendix A-5th Cir. p. 9)

The Petitioner also raised the issue of HISD's refusal to act on Brown's grievances. (Tr. Vol. 1, pp. 94, 95; Vol. 2, p. 241). Dr. Jones acknowledged receipt of Brown's grievance (Tr. Vol. 2, pp. 105, 283), but he gives an arbitrary and capricious reason for not acting on grievance. Jones stated "I will not proceed with your grievance until these matters are resolved." If Dr. Jones had acted on grievance, an hearing would have been allowed. Brown also filed a grievance with Ruben Lopez, district superintendent, who also would not respond to Brown's grievance. He wrote "I do not plan to respond to your grievance until your medical problems are resolved" (Tr. Vol. 1 p. 104; Vol. 2 p. 284). Brown also attempted to obtain an hearing with the HISD Board. Brown wrote "The Board should had at least granted Ms. Brown a hearing." (Tr. Vol., pp. 95, 106, 110, & 111). Brown made the district court aware of the fact that HISD Board would not respond to Brown when she asked for any help. (Tr. Vol. 1, pp. 6, 7, Vol. 2, pp. 240, 241).

Brown also wrote in her response to motion for summary judgment:

"Regardless of Dr. Wade's conclusions, the Defendants on February 24, 1989, refused to return Ms. Brown to her teaching position, and had refused to provide her a due process hearing before the expiration of her salary and employment benefits on April 1989." (Tr. Vol. 1, p. 96).

Dr. Wade and two other experts recommended that Brown be reinstated; the fact that HISD refused to reinstate substantiates HISD just wanted to rid itself of Brown using any means. HISD has shown little respect for individual rights, the Constitution, and the courts. Dr. Jones failed to use due process again when Brown was removed by using a coupe with a security guard. Brown was not given <u>any</u> notice; she was surprised. (Tr. Vol. 1, p. 92). Brown sufficiently notified the court of this due process violation. She wrote

"On January 20, 1989 Ms. Brown was placed on personal paid leave by her principal, Don Jones, because he perceived that she would not be able to fulfill the requirements of her present teaching assignment at Lee High School until further [psychiatric] evaluation and treatment occurs.' Dr. Jones failed to give Plaintiff Brown reasons or notice. . . .He stated that only based on Dr. Estella Robinson recommendation, they were removing Plaintiff from the classroom." (Tr. Vol. 1, p. 94, Vol. 2, p. 240).

Petitioner Brown made the district court aware of the fact that HISD Board would not respond to Brown when she asked for any help. (Tr. Vol. 1, pp. 6, 7, Vol. 2, pp. 240, 241). The school board ignored Brown's pleas for help which is a violation of Texas Education Codes (Appendix G).

<u>RESPONDENT'S OR DEFENDANT'S ANSWER-</u>"She was given

written and oral notice of the proposal to place her on medical health leave and the opportunity to adduce evidence opposing this proposed placement." (Tr. Vol. 1, p. 146).

"The Petitioner is employed at the HISD pursuant to a continuing contract. Thus, under Loudermill, the Petitioner was entitled to some due process prior to being placed on medical leave." (Appellee's p. 17) What does 'some due process' consist of?

"the District provide the Petitioner with notice of the proposal to place her on medical health leave, an explanation of the reasons for this action, and the opportunity to respond to the allegations". (Respondent's p. 18). Attorney Horner failed to support it with facts, dates, or a paper trail.

Notice the respondent's attorney did not mention any type of hearing; Brown had no opportunity to respond or 'adduce' evidence.

Attorney Horner intentionally decided not to support Judge Harmon's judgment that a forced & ordered psychiatric exam was a condition satisfying due process. Horner wilfully avoided the district court's error of thinking Dr. Mattye Glass was Brown's evaluation psychiatrist. Brown adequately notified the lower court of this error. The defendant's attorney provided an affidavit of Dr. Glass but not of Brown's evaluating doctor, Dr. Robinson. Would this information had effected the summary judgment decision?

LIBERTY INTEREST-Neither the Respondent or either one of the lower courts addressed the liberty interest issue which was raised. (Tr. Vol. 1, pp. 18, 97; Vol. 2, pp. 236, 240, 242). HISD has imposed on Brown a stigma disability that has foreclosed her freedom to take advantage of other employment opportunities. Because deprivation not only of present government employment, but also of future opportunity for government employment is no small injury. Bishop v. Wood, 48 L Ed 996. The allegations of mental illness are so serious that a full-hearing, pretermination, and post-termination hearing was required. Let's remind ourselves: THERE HAS BEEN NO TYPE OF HEARING. Brown has a bachelors degree in math, masters in computer literacy, and she is unemployed. Justice Douglas ruled that one of man's most precious liberties is his right to work and that man's deprivation of that "liberty" without a fair trial denies him due process. Kelly v Johnson 47 L Ed 2d at 997. An employee is entitled to a due process hearing if it is established that the charges are such that the denial of future employment is likely to seriously harm the employee's standing in the community or the action will foreclose to the employee future employment opportunities. Paul v. Davis,

424 U.S. 693, 704; 96 S.Ct. 1155 (1976). Board of Regents v. Roth, 408 U.S. 574. Brown has been stigmatized and labeled by HISD's adverse actions. Her liberty interest has been implicated. Brown claimed that HISD's actions in finding her not fit for duty by reason of mental illness which is unsupportable in fact denied her the liberty interest in her good name and reputation without due process of law. (Tr. Vol. 2, p 236, 242).

The following facts satisfy the public disclosure requirement relative to liberty interest. Brown was watched by McClellan and a security guard on her last day. (Tr. Vol. 1, pp. 12, 92, Vol. 2, p. 237). Recall that McClellan was one reason for Brown calling police. Brown had not been given any prior notice about her removal on January 19; McClellan 'couped' Brown from the class-communist style. McClellan, security guard, and her students watched as Brown gathered her essentials. Several teachers also observed Brown's removal with a security guard. The security guard presence implicated a stigma on Brown. Jones instructed Brown to call the school's secretary before coming on campus anymore. Did Brown's students, neighboring teachers, and school secretary think Brown was dangerous? Jones' actions

seriously damage Brown's standing and associations in her community. Did Brown's students share the fact with others that a teacher was escorted off the campus with a security guard? There is no evidence that Brown has hurt anyone or posed a threat to anyone. There is no evidence that Brown has a mental disorder; what is her 'mental disorder'?

The public disclosure requirement is also met since HISD removed Brown during midyear. And prospective employers would know that the removal was made effective before the end of the current school year and they would know the 'removal' was based on stigmatizing grounds, even if they do not know the particulars, because midyear discharges or removals are authorized only on certain grounds which reflected on Brown's fitness to teach. Vanelli v. Reynolds School Dist. No. 7, 667 F.2d 773 (9th Cir. 1982). Prospective employers were told of Brown's 41 'sick' days. Brown wrote "HISD tells future employers about (Plaintiff) taking 41 days of sick leave, this stigmatizing information is false and misleading. Plaintiff was forced to take those 'sick' days" (Tr. Vol. 2, p. 242). Under these principles, petitioner's midyear dismissal implicated a protectible liberty interest. Why couldn't Brown remain until the end of the

this involving delicate constitutional rights, complex fact situations, disputed testimony, and questionable credibilities" Porter v Califono, 592 F.2d at 778.

Honore had protested actions by the dean and signed grievance letters; he was dismissed in retaliation for the exercise of his first amendment right to free speech. Honore v. Douglas, 833 F.2d 570 (5th Cir. 1987).

"Constitutional issue whether plaintiff had been unlawfully dismissed from her employment in retaliation for her exercise of freedom of speech rights was not for resolution by summary judgment. Fed.Rules Civ.Proc. rule 56 (c), 28 U.S.C.A." Ring v. Schlesinger 502 F.2d at 480 (5th Cir. 1974).

Again the 5th Circuit and the Supreme Court denied summary judgment as a resolution for a First Amendment case. Perry v. Sindermann, 408 U.S. 598, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972)(from the 5th Cir.) The Supreme Court in Perry v Sindermann claimed the district court erred in granting summary judgment and wrote that the District Court therefore erred in foreclosing determination of the contested issue whether the decision not to renew was based on respondent's exercise of his right of free speech. The Fifth Circuit deviated greatly from its earlier holdings to settle First Amendment issues and this is why this petition is worthy of the Supreme Court consideration.

Fifth Circuit stated "Summary judgment . . . . . is not only an instrument of just, speedy, and inexpensive

resolution, but also a lethal weapon capable of overkill." Nunez v. Superior Oil Co., 572 F.2d 1119, 1123 (5th Cir. 1978) 5th Circuit authorities and Sindermann indicate that the 5th Circuit used the wrong forum, a lethal weapon, to settle Brown's case. The Honorable Supreme Court's direction and guidance is required to preserve the American way. "However, because we find that the First Amendment claim raised disputed issues of material fact which were not proper for disposition on summary judgment, we reverse and remand for a trial on the merits of that claim." Holley v. Seminole County School Dist., 755 F.2d 1492 (11th Cir. 1985). The impact of affirming the 5th Circuit's decision could be devastating. Teachers across the country will be afraid of coming forth for the fear of being label, rediculed, and without liberty-the right to work. The supervisory powers of this Honorable Supreme Court are needed.

Why did the 5th Circuit deny Brown a trial de novo? The Supreme Court also has ruled that a teacher is entitled to a hearing in federal court in order to prove the First Amendment allegations. Bishop v Wood, 48 L Ed 2d at 998. Claim that dismissal from employment constituted retaliation for First Amendment protected activity, like other claims of

substantive constitutional right, must be given de novo review in the district court Holley v. Seminole County School Dist., 755 F.2d 1492. Neither of the lower courts held any type of hearing on the merits for Brown's lawsuit. No questions were asked despite the many and complex issues.

The Petitioner does not understand why the district court did not address the retaliation issue or First Amendment constitutional issue which was acknowledged throughout the record. (Tr. Vol. 1 pp. 18, 27, 29, 31, 93, 99; Vol. 2 pp. 236 & 239; 342, 351, Vol. 3 pp. 553 & 554). The district court abused its discretion in not recognizing the reprisal for the exercise of Brown's constitutionally protected rights. (Tr. Vol. 2 pp. 233, 236, 239, 244). Brown stated that "Plaintiff had been denied the protection of the First Amendment and Title VII after she chose to express her opposition about discriminatory practices by going to the police". (Tr. Vol. 1, pp. 93, 99; Vol. 2 pp. 236 & 239; Vol. 3, pp. 342, 351). Since Brown did (1) claim that she was retaliated against for protected speech made to the police, (2) ordered to see a psychiatrist, and (3) she was unlawfully removed from her teaching position in retaliation for her exercise of her freedom of speech rights, Brown had thus

raised a constitutional issue. Perry v. Sindermann, 408 U.S. 593, 598; Ring v. Schlesinger 502 F.2d 490. Therefore, the lower courts should had determined that there was a genuine dispute as to whether Brown was dismissed on an impermissible basis--as a reprisal for the exercise of constitutionally protected rights.

The Supreme Court (case originally from the 5th Circuit) went on to recognize "that teachers are the members of the community most likely to have informed and definite opinions as to issues of public importance concerning operations of schools and that it is essential that they be able to speak out freely without fear of retaliatory dismissal." Pickering v. Board of Education, 391 U.S. at 572, 88 S.CT. at 1736 (1968). Therefore, it is imperative that this Honorable Supreme Court grant this petition of certiorari so that teachers across the country will not be afraid to speak out on public issues.

In another case, an employee after going to EEOC was labeled as needing psychiatric treatment. This case was settled justly from the beginning at the district court level. The court stated that Kyriazi actively protested and rebelled against what she perceived to be the unfair treatment of

women; she also filed an EEO complaint against Western. Kyriazi was finally fired when she refused to comply with her employer's ultimatum that she seek psychiatric help. Kyriazi v. Western Elec. Co., 461 F.Supp. 894 (1978). In Kyriazi, the court found that the defendant retaliated by requiring Kyriazi to see a psychiatrist as a condition of her continued employment. After Brown had protested to police about discriminatory practices, Jones retaliated against Brown by requiring her to see a psychiatrist. Kyriazi's supervisor, Wertz, stated she was suffering from a mental disability, acted irrationally. The district court gave an explanation of why Kyriazi experience problems at Western and wrote

"But the fact remains that her protest were over real and not imagined wrongs, and that she had every right to remain steadfast and refuse to bow or bend. It often happens that progress and victories in the struggle for human rights are made by those who are strong enough to endure the struggle. A weaker, more pleasant, less demanding person than Kyriazi might well have capitulated some principle, and survived at Western. **But the law does not impose such a duty on anyone.**" Kyriazi v. Western Elec. Co. 461 F.Supp. 894 (1978).

To establish a First Amendment claim, the court must determine whether the plaintiff's activity was indeed protected by the First Amendment and whether the plaintiff's conduct was a substantial or motivating factor in the state employer's decision to take adverse employment

action against the plaintiff. Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977). Brown has a substantial First Amendment claim.

"To establish a prima facie case under section 704(a), the plaintiff must establish (1) statutorily protected expression, (2) an adverse employment action, and (3) a casual link between the protected expression and the adverse action." Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130 (5th Cir. 1981).

1. The record shows that Brown was viewed favorably and considered competent by the appellee-defendant prior to her speech to police. Both the 5th Circuit and Brown agree that there was definitely a causal connection between Brown's protest and her being referred to see a psychiatrist and then being removed from the classroom. Most of Brown's evaluations were clearly above 'satisfactory'. (Tr. Vol. 2 pp. 262 & 263). Her most recent and complete evaluation rating was the highest rating a teacher could receive. Even though Brown continuously complained about discriminatory procedures used to assign students to her classes, she did an excellent job with 'less-equipped' students. Brown's proficiency test scores were higher than other teachers on

the same campus and district in most cases. (Tr. Vol. 2, p. 264). Her 2 most recent evaluations indicated that she was a 'clearly outstanding' (two evaluators) teacher and 'satisfactory' (one evaluator) teacher. (TR. Vol. 1, p. 99; Vol. 2, pp. 237, 239, 262, 290; Vol. 3, pp. 344, 349). The 'clearly outstanding' rating was given to her less than 3 school months before she was labeled as not being "emotionally capable of performing her duties as a teacher" (Tr. Vol. 1, p. 106; Vol. 2, pp. 181, 262, 267). In addition, a satisfactory rating was given to Brown by Anne McClellan on 11/21/88 which was only 2 days before she protested to police and more importantly only 7 days before she was stigmatized on 11/28/88. Coincidentally, Jones even stated to the police that McClellan's overall rating of Brown was satisfactory; "First of all, Ms. Brown has accused Ms. McClellan of giving her a bad evaluation. I think it needs to be noted that the overall--END OF TAPE". (tape) Only 5 days later, Jones labeled Brown as being mentally incompetent.

Brown's evaluations were all 'good', 'clearly outstanding', and 'satisfactory' and there were plans for Brown to transfer prior to Brown calling police. Brown wrote

an HISD administrator and stated "It is interesting to note on the tape that Dr. Jones told the police that he would work toward a transfer for me." (Tr. Vol. 2, p. 292). **About 14 days before Brown went to the police, there was talk of Brown transferring to another school.** (Tr. Vol. 1, pp. 18, 27, 28, 33; Vol. 2, pp. 272, 275, 293, 295). On November 10, 1988, Dr. Jones wrote Mr. Ruben Lopez requesting an immediate transfer for Brown. (Tr. Vol. 1, p. 33).

Because Brown had exhausted all other avenues of protest such as EEOC, NAACP, Superintendent Raymond, she exercised her right to protest to Houston police department about discriminatory practices. (Tr. Vol. 2, pp. 236, 272, 291). Brown could had protested to the media, but she was concerned about HISD's reputation. During the previous year, a black man at Lee had protested to the media, but he was not terminated. Brown called police on November 23, 1988 and just five days later, November 28, 1988, she was being referred for psychiatric evaluation. (Tr. Vol. 2, pp. 269, 270). Dr. Jones alleged Brown's calling the police as one of the reasons for referring Brown. (Tr. Vol. p. 266). Brown's protest to police definitely played a part in HISD taking adverse action toward Brown. The record

shows that Brown's 'mental illness' label was created only after Brown made her protected speech. This further substantiates Brown's claim. Anderson v Evans 660 F2d 153 (6th Cir. 1981). Brown's problems did not start until after her protected speech to police. Both Brown and the 5th Circuit agreed about the casual link.

5th Circuit Answer

"Ms. Brown's calling the police apparently precipitated the referral to Health Services." (Appendix A, p. 4)

District Court's & Defendant HISD's Answer- no comment on casual link issue.

Principal Jones' reaction to Brown's protest to police-one of 7 reasons to 'support' referring Brown

Her principal used 'Brown's protest to police' as a reason:

"7. Unprofessional behavior - dialing 911 because of a poor assessment. She filed the complaint in Dr. Jones' and her name against Anne McClellan, Assistant Principal, for assault." (Appendix A, p. 3) (Tr. Vol. 1, p. 114; Vol. 2, pp. 266, 347)

2. Brown protested about items of public concern. Brown also arranged to to communicate privately with her principals and police than to express her view publicly.

Because Brown had exhausted all other avenues, she exercised her right to protest to Houston police department about discriminatory practices. (Tr. Vol. 2, pp. 236, 272, 291). (Appellant's, p. 20).

Throughout the record, Brown indicated that she called police to protest discriminatory practices which included the questionable evaluation. Brown's speech to the police involved other discriminatory practices beside Anne McClellan's questionable evaluation of Brown. Consequently, Brown's discriminatory complaints to police are matter inherently of public concern. "Mrs. Givhan's right to protest racial discrimination--a matter inherently of public concern--is not forfeited by her choice of a private forum." Connick v. Myers, 461 US 138, 75 LE d 708, 103 S Ct. 1684 (1983).

"Plaintiff had been denied the protection of the First Amendment and *Title VII* after she chose to express her opposition to discriminatory practices by going to the police. After all, she had exhausted all other avenues, including trying to meet with the superintendent, Dr. Joan Raymond. (Please refer to Exhibits 17-25 which show Plaintiff had almost exhausted all avenues to protest HISD practices)". (Tr. Vol. 1, p. 91; Vol. 2, p. 236).

There is a tape of Brown's speech to police, but the defendant's attorney would not furnish the requested discovery. But, the record indicates Brown protest to police

was protected. Brown had protested discriminatory practices using many different avenues such as Lee High administration, HISD administration, union, NAACP, and the EEOC even before she received the 'bad' or 'satisfactory' evaluation. Brown complained about matters of public concern to others beside the police. Brown wrote "Understand that I called the police out of desperation; no one else would help me." (Tr. Vol. 1, p. 290). This statement indirectly shows that Brown had called police to complain or protest issues that other people ignored. Brown did not protest to 'other people' about a bad evaluation; but she protested class assignments and student assignments. Attorney Horner found it to the defendant's benefit not to discuss and to omit the public concern issues that Brown shared with police and issues that were raised in her brief (Appellant's, p. 24). But Brown wrote:

"Brown had been protesting HISD practices that were of public concern. Even though Mr. Montez was bilingual, Brown received ESL students that he was more qualified to teach. (Tr. Vol. 2, p. 295). Brown wrote "There is another math teacher who speaks spanish fluently; he was given one FOM class while I was given 3 FOM classes. I do not speak any spanish. The counsellors continuously give me the new 'F' students or non-credit students." (Tr. Vol. 2, p. 294). Brown wrote "they made my classes a dumping ground for failing students; Ms. Moore insisted that I use my planning period for ESL training." (Tr. Vol. 2, p. 276). Brown also stated "I was assigned students that had given up all hope of

being successful in school. The counsellors placed special ed. students and even one retarded student in my class." (Tr. Vol. 2, pp. 291, 294, & 295). Brown essentially communicated the same information to the police. Brown told the police that McClellan had threatened to give her a bad evaluation. Brown told the police that she felt she was being discriminated against; she explained that she was being given the worst students while the 'teacher of the year' was being given some of the best students. She stressed to the police that another black teacher at Lee had also gone to EEOC and the union and received no help; she further stated that the EEOC was ineffective. HISD's attorney would not respond to Brown's request for copy of tape. (Tr. Vol. 1, p. 33). Some of Brown's speech to the police involved how students were assigned to teachers and the effectiveness of EEOC. Brown's speech to police was protected." (Appellant's, p. 24).

"Brown did not agree with Lee's method of assigning low-level students to her class. Brown and students have experienced class assignment problems. The media has communicated that the hispanic drop-out rate is unusually high. Hispanic students walked out of classes at Austin High because of class assignments; at Lee students complained about class scheduling and assignments. Does the public need to know about the scheduling problem at some of HISD's schools?(Appellant's, p. 22).

SHOULD HISD HAD BEEN PLACING STUDENTS TO HARASS, RETALIATE, AND TO DISCRIMINATE AGAINST BROWN? THIS IS AN ITEM OF PUBLIC CONCERN.

The police did not refer Brown to a psychiatrist, but he suggested she go to the District Attorney's office. (Tr. Vol. 1, p. 30); but her supervisor referred her.

FIFTH CIRCUIT ANSWER

"she says that the HISD retaliated against her because she exercised her free speech rights by going to the police. This expression is not the sort of speech protected by the legal theory that she invokes, however." (Appendix A, p. 9)

But, it should be stated that the 5th Circuit did, in the final analysis, assumed that Brown's speech to police was protected. But then the 5th Circuit argued that her speech or communication was of a private nature. But, In Givhan v Western Line Consolidated School District 439 US 410, 58 L Ed 2d 619, 99 S Ct 693 (1979), the Supreme Court held that First Amendment protection applies when a public employee arranges to communicate privately with his employer rather than to express his views publicly.

5th Circuit's Answer

"Even if we assume that the matters that moved Ms. Brown to call the police were matters of public concern, complaining about them to the police is communication that is of a private nature. Her First Amendment claim is therefore without legal merit." (Appendix A, p. 9)

The 5th Circuit's view about 'private nature' is not supported by Connick as follows:

"Most recently, in Givhan v Western Line Consolidated School District, 439 US 410, 58 L Ed 2d 619, 99 S Ct 693 (1979), we held that First Amendment protection applies when a public employee arranges to communicate privately with his employer rather than to express his views publicly." Connick v. Myers, 461 US 138, 146.

The Supreme Court case, Givhan v. Western Line Consolidated School District, contradicts the 5th Circuit's holding on private expression in regards to Brown privately

protesting discriminatory complaints to her principal and police:

"A public employee does not forfeit his First Amendment protection against governmental abridgment of freedom of speech when he arranges to communicate privately with his employer rather than to express his views publicly. . . Pickering, Perry, and Mt. Healthy do not support the Court of Appeals' conclusion that private expression is unprotected by the First Amendment" Givhan v Western Line Consolidated School District, 439 US at 410.

District Court-no statement on First Amendment issue

Defendant's Answer

Horner also argued that even if Brown's first amendment claim were properly before the trial court, her speech was one of private and individual concern. He wrote

"the Appellant claims that she was retaliated against after she called the Houston Police Department to complain about a negative evaluation. The fact that the Appellant complained about her job evaluation places her speech within the category of private concern." (Appellee's, p. 24).

4. All of the reasons Brown finally received were arbitrary and capricious, just a coverup to retaliate for Brown's protest to police.

The lower courts including the 5th Circuit accepted the 7 reasons as the gospel. No questions were asked about these very vague reasons. Brown wrote:

"The reasons Jones gave for referring Brown were grotesque and were not supported by fact. On November 28, 1988 Jones failed to give Brown the seven reasons for referral, but Dr. Glass finally gave Brown the absurd reasons

after December 5, 1989. (Tr. Vol. 1, p. 178). Brown was never afforded the opportunity to defend herself relative to the seven reasons; the reasons given were not credible and vague. Principal Jones had no reasonable basis for questioning Brown's mental condition. He requested Brown submit to a psychiatric evaluation in retaliation for her protesting HISD's discriminatory practices by calling the police. The reasons Principle Jones gave for referral were very vague. . .(Tr. Vol. 2, pp. 266, 347)." (Appellant's, p. 25)

The 1st Circuit wrote "A school committee, therefore, may justifiably compel a teacher or administrator to submit to a psychiatric examination as a condition of continued employment if the committee has reason to believe that the teacher or administrator may be jeopardizing the welfare of students under his or her supervision." Daury v. Smith 842 F.2d 9 (1st Cir. 1988).

It is not uncommon today for courts to insist that the charges be linked to the teacher's fitness to teach. Furthermore, this is a way of preventing to avoid the constitutional vice of vagueness, and as a way of assuring that the basis of the adverse action is rationally related to the legitimate school purposes, the courts have insisted that there be a nexus between the teacher's behavior and an effect upon the school. Thompson v. Southwest Sch. Dist., 483 F.Supp. 1170 (W.D. Mo. 1980).

The lower courts did not consider if HISD had a 'reasonable basis' for referring Brown or 'nexus' in removing

Brown from classroom; therefore, Brown was denied substantive due process where the classroom removal deprived Brown of employment for reasons which are arbitrary or capricious. Drown v. Portsmouth School District 451 F2d 1106 (1st Cir. 1971)

On November 28, 1988 within five days of her protest on November 23, 1988, H.I.S.D., without giving Brown reasons or a hearing, took adverse action of referring Brown for a possible psychiatric evaluation to see if she was fit to remain in the classroom. (Tr. Vol. 2 pp. 237, 269, & 271). Brown had asked Dr. Jones to wait until she retained an attorney; Dr. Jones refused. (Tr. Vol. 2, p. 269). On the very next day, November 29, 1988, Dr. Glass decided Brown should see a psychiatrist after meeting with her to determine whether there was reason for concern. HISD said that her choice of Dr. Robert Bell was not acceptable because he was not a psychiatrist. (Tr. Vol. 2, p. 270). So Brown selected Dr. Estella Robinson (black), one of the two black psychiatrists in Houston; Dr. Robinson met with Brown only once for only 45 minutes and did not perform a battery of tests. (Tr. Vol. 1, pp. 27, 38; Vol. 2, p. 240). The record

shows that as of December 5, 1988, Brown still had not received reasons for referral. (Tr. Vol. 2 p. 270).

Brown remained in the classroom for a long length of time even after the initial referral. During that time, no one tried to assist Brown or made any attempt to remedy the 'deficiencies'. HISD found it convenient to remove Brown after she had completed preparing for semester exams. Note that there were not any remedies suggested that would keep Brown on the payroll until her 'problems' were resolved. Why didn't HISD place Brown in a non-teaching position until her 'deficiencies' were healed? Were there really any deficiencies? Were they taking a chance by keeping Brown in the classroom after discovering mental deficiencies? Why did HISD feel safe in leaving Brown in the classroom? **Because there were no mental deficiencies. There was no effort to refer or remove Brown prior to her speech to the police.** This shows HISD was trying to 'get rid of the troublemaker'. It is interesting to note that neither the defendants or the district court addressed the reasons Brown was referred. **Isn't this one of the major issues in this case?** Did Brown rape a student? Did Brown hurt a student? Did Brown sell drugs on campus? Did Brown threatened to hurt

someone? No to all those questions, but Brown did lawfully protest to the police which is permissible by the First Amendment. What is Brown's mental disorder? The Defendant should had specifically identified and named Brown's mental disorder. The District Court erred in not fully searching the entire record for issues. The question of why Brown was referred is major and of utmost importance. Brown has successfully established a First Amendment claim by showing her speech to police was protected and is a factor in the defendant's adverse actions. Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, She has proved a prima facie for retaliation. Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130 (5th Cir. 1981).

The defendant's did not answer the First amendment claim; and yet the district court still granted summary judgment.

RESPONDENT'S ANSWER AFTER APPEAL-"Because the first amendment claim was not clearly raised before the trial court, this claim should not be considered by this Court in determining whether summary judgment was proper." (Appellee's, p. 22).

Brown still do not understand why neither the district court or the defendant addressed the 1st Amendment issue which was raised throughout the record. (Tr. Vol. 1 pp. 18,

27, 29, 31, 93, 99; Vol. 2 pp. 236, 239, 342, 351, Vol. 3 pp. 553, 554). Yet, district court granted summary judgment.

RIGHT-TO-SUE ISSUE

"The 5th circuit failed to use equitable tolling by not considering that Brown's prior attorneys were experiencing problems that were out of Brown's control. Brown was not PRO SE when she received either of the right-to-sue letters. The district court failed to use equitable tolling by not acknowledging two right-to-sue letters dated September 6, 1988 and June 21, 1989. Considering only the September 1988 right-to-sue letter, the district court erred in granting summary judgment for the defendant because of a mistaken jurisdictional prerequisite. The lower courts failed to provide Brown the protection of Section 1983 even though she established constitutional violations."

The 5th Circuit erred in determining Brown filed her lawsuit too late; in fact, Brown filed her lawsuit too early on March 28, 1989 and received her right-to-sue on June 28, 1992. Brown's two attorneys failed to amend complaint to show issuance of the right-to-sue. Brown's first attorney was suspended or disbarred; her second attorney withdrew. The 5th Circuit failed to use equitable tolling considering the record shows that these circumstances were out of Brown's control. Brown did amend her complaint June 1990 and Judge Harmon rejected the amended complaint until Brown remedied defiencies. The district court did finally accept Brown's amended complaint. Brown was led to believe all

statutory requirements for bringing a suit had been satisfied by her amended complaint. When the district court notified Brown of deficiency, she immediately filed the June 1989 right-to-sue in March 1991 prior to final judgment. The 5th Circuit erred in stating that the district court considered a number of Brown's motions after rendering summary judgment. The record shows that the district court never considered any of Brown's motions after summary judgment. The 3rd Circuit ruled the district court had erred in holding that pleading the issuance of a right-to-sue letter is a jurisdictional prerequisite to bringing a Title VII suit in federal court. Gooding v. Warner-Lambert Co., 744 F.2d 354 (1984). Gooding's right-to-sue letter was not issued until after complaint was filed; the Petitioner court ruled that this did not render complaint deficient. The 3rd Circuit backed its decision on Zipes v. Trans World Airlines, Inc., 455 U.S. 385,102 S.Ct. 1127 (1982). The 3rd Circuit also ruled the district court erred in not allowing Gooding a chance to amend complaint. So, Gooding show that the district court committed an abuse of discretion by not allowing Brown an opportunity to amend complaint to show issuance of right-to-sue letter.

The record indicates that Brown filed her lawsuit in March of 1989 and her first attorney, Leopoldo Fraga, who was suspended or disbarred requested the right-to-sue in June 1989. (Tr. Vol. 3, p. 481). Attorney Horner attached the two EEO complaints (Tr. Vol. 1, pp. 170, 184), and the district court was made aware of the 2nd EEO complaint throughout the record. (Tr. Vol. pp. 100, 117, 184, 244, 258 & 318). Brown and Fraga had agreed that Fraga would obtain the right-to-sue letter before filing the lawsuit. Fraga also failed to file the right-to-sue with the district court and Brown's second attorney did not recognize the statutory requirement of amending Brown's complaint to reflect the right-to-sue. This statutory requirement was totally out of Brown's control. If neither of Brown's past two attorneys failed to file the right-to-sue, why have the 5th Circuit been so harsh to require a 'mentally ill' PRO SE litigant to satisfy the statutory requirement? Courts have generally reserved the remedy of equitable tolling for circumstances which were truly beyond the control of the plaintiff. The Supreme Court has held that equitable tolling is justified where the court has led the plaintiff to believe all statutory requirement for bringing a suit have been satisfied or where the

defendant's conduct lulls the plaintiff into inaction. Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151. 104 S.Ct. 1723, 1725, 80 L.Ed.2d 196 (1984). The lower courts could had been more favorable to the non-moving party as the law requires.

The record clearly shows that Fraga was having many personal problems when he took Brown's case and he was later suspended. The record also shows that Brown was having problems with her 2nd attorney who would not do any work on her case. This is why Brown filed a grievance against Mims. Surprisingly, Judge Harmon permitted Mims to withdraw even though Brown objected to his withdrawal and notified the court that Mims would not work on her case. Neither before or shortly after both Brown's attorneys' suspension or withdrawal was was she aware that her complaint was deficient. Within two weeks of Brown learning her complaint was deficient, Brown seeked to remedy the deficient. In addition; Brown attached them as exhibits in responding to the defendant's motion for summary judgment (Tr. Vol. 1, pp. 100, 116, & 117). The district court erred in failing to recognize or acknowledge the 2nd EEO

complaint; the court never made mention of this 2nd complaint in her **MEMORANDUM AND ORDER.**

Judge Harmon mistakenly acknowledged only one right-to-sue letter, so the Petitioner responds by filing **PLAINTIFF'S MOTION THAT COURT GRANT PLAINTIFF AN OPPORTUNITY TO RE-PRESENT FACTS & AN EXTENSION** along with the 2nd right-to-sue letter as an exhibit with the district court on January 27, 1991. A district court clerk made a mistake of not filing **PLAINTIFF'S MOTION THAT COURT GRANT PLAINTIFF AN OPPORTUNITY TO RE-PRESENT FACTS & AN EXTENSION** with the record. (Supp. Record On Appeal). The defendant's attorney acknowledged the above filing to re-present facts and then objected to plaintiff's second motion for reconsideration. (Tr. Vol. 1, p. 6). But Brown did notify the court of this error; but the district court did not respond. Brown wrote "In the above state motion, plaintiff provided the court with her right-to-sue." (Tr. Vol. 1, p. 3). The district court abused its discretion in not (1) 'combing the entire record', (2) giving plaintiff another chance to present facts, and (3) acknowledging the 2nd EEO complaint or the June 1989 right-to-sue letter. (Tr. Vol 1, pp. 5, 6, 26).

Neither the district court or the defendant knew Brown had actually gone to court early. The record and other documents show that Brown went to court before receiving the right-to-sue letter because of Fraga's difficulties. Even the petitioner's right-to-sue letter being issued after the filing of the complaint did not compromise jurisdictional requirements-Zipes, Pinkard, and Gooding.

5th Circuit Answer- "As the district court held, her suit was not timely filed relative to the first notice of a right-to-sue. When Ms. Brown received the second notice, although her suit was already pending, she might have maintained her action by amending her complaint and filing the second notice within ninety days." (Appendix A, p. 12).

Clearly, Pinkard v. Pullman-Standard does not promote dismissing Title VII cases because of a procedural technicality as this 5th Circuit has done.

"Barring a Title VII plaintiff, who received his right-to-sue letter after filing suit, from ever pursuing his Title VII claim would not only be anomalous, but also would be an extreme sanction, contrary to the general policy of the law to find a way to prevent the loss of valuable rights, not because something was done too late, but rather because it was done too soon. . . . courts construing Title VII have been extremely reluctant to allow procedural technicalities to bar claims

under the Act" Pinkard v. Pullman-Standard, A Div. of Pullman, Inc., 678 F.2d at 1218 (5th Cir. 1982).
DISTRICT COURT'S ANSWER-"In September of 1988, the EEOC found no reasonable cause to believe that Brown had been subject to racial discrimination, and issued a right-to-sue notification letter dated September 6, 1988. Brown did not commence this action until March of 1989. . . . The Supreme Court has held that compliance with the filing deadlines enunciated under Title VII is a jurisdictional prerequisite." (Tr. Vol. 1, p. 50); (Appendix B-8)

Judge Harmon is clearly wrong; a right-to-sue letter is not a 'jurisdictional' requirement in the constitutional sense, but is a statutory requirement similar to a statute of limitations that is subject to waiver, estoppel, and equitable tolling. Zipes v. Trans World Airlines, Inc. 455 U.S. at 393.

Filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement, similar to a statute of limitations that is subject to waiver, estoppel, and equitable tolling. Zipes v. Trans World Airlines, Inc. 455 U.S. at 393, 102 S.Ct. at 1132 (1982). The 5th Circuit wrote that barring a Title VII plaintiff, who received his right-to-sue after filing suit, from ever pursuing his Title VII claim would be an extreme sanction. Pinkard v. Pullman-Standard, 678 F.2d 1211 (5th Cir. 1982). The 5th Circuit also made it clear that plaintiffs receiving their right-to-sue letters while their lawsuit was

pending was not reason for the district court to dismiss their claims.

"Where a provision proves to be merely a condition precedent to bringing suit instead of a source of judicial power, the courts can, give the appropriate circumstances, equitably modify their application of the statutory terms." Harris v. Amoco Production Co., 768 F.2d 669 (5th Cir. 1985).

Two cases show that Harmon did not handle Brown's case properly. Federal district court should have granted former employee who was Pro Se, additional time to obtain affidavits in response to employer's summary judgment motion or to verify his complaint, where he submitted material that would have precluded grant of summary judgment had it been in the proper form, and once he understood requirements, he indicated need for, but was not given, additional time to put his response in order. Jaxon v. Circle K Corp., 773 F2d 1138 (10th Cir. 1985). The rights of PRO SE litigant require careful protection where highly technical requirements are involved, especially when enforcing those requirements or technicalities that might result in a loss of the opportunity to prosecute or defend a lawsuit on the merits. Garaux v. Pulley, 739 F2d 437 (9th Cir. 1984). BROWN WAS AND IS PRO SE.

DEFENDANT'S ANSWER

"The United States Supreme Court has held that compliance with the filing timelines enunciated for Title VII is a jurisdictional prerequisite and the failure to follow such timelines is grounds for dismissal of a Title VII claim." (Tr. Vol. 1, p. 194). "However, the plaintiff has failed to file her Title VII claim in a timely manner. She initially filed a charge with the Equal Employment Commission on this. The EEOC issued a right-to-sue letter . In the right-to-sue letter, the Plaintiff was specifically told that suit on her Title VII claim must be filed on or before December 19, 1988. See Exhibit 'F'. This lawsuit was not filed until March of 1989." (Tr. Vol. 2, p. 147).

Attorney Horner dumped his original and lower court's argument of 'jurisdictional prerequisite', but with his new line of argument he stated "The second right-to-sue letter, therefore, was not presented in a timely manner before the trial court and should be disregarded" (Appellee's, p. 20). With the defendant's new argument, Horner claimed "there was no way for the trial court to have properly considered the second right-to-sue letter, because the Petitioner did not file or present that letter with the court in any manner until after the court had granted summary judgment to the HISD . . . the law requires that the issues raised in a right-to-sue letter be asserted within . . .(90) days from the date the letter is issued". (Appellee's, p. 20). Did Horner realize that the issues raised in the right-to-sue or 2 EEO complaints were presented to the court upon filing of the original complaint?

SEC. 1983 - the lower courts failed to protect Brown.

"School boards are "persons" subject to liability under 42 USCS 1983 for violating another person's federally protected rights, and thus are not wholly immune from suit under Section 1983" Monell v New York City Dept. of Soc. Serv. 436 US 658, 56 L Ed 611, 98 S Ct. 2018.

Brown has proved violations of her 1st and 14th amendments rights and HISD acted under 'color of state law'.

Any victim who alleges and proves a violation, under color of state law, of a federally protected right has access to section 1983. Findeisen v. North East Independent School Dist., 749 F.2d at 237 (5th Cir. 1984) (Appellant's, p. 39)

CONFLICTING PSYCHIATRIC REPORTS ISSUE

"The lower courts had no authority to try and decide the 1st and 14th Amendment issues, conflicting psychiatric reports (credibility assessments), motive or intent issues. HISD accepted only one negligent psychiatric recommendation that called for Brown's removal from the classroom and rejected three more credible psychiatric recommendations for reinstatement."

Summary judgment is not a substitute for the trial of fact issues. Accordingly, neither the district court or the 5th Circuit can try issues of material fact on a Rule 56 motion but only is empowered to determine whether there are issues to be tried. FRCP 56(c); Rosenthal v. Rizzo, 555 F.2d 390 (3rd Cir. 1977).

The 5th Circuit and the district court committed abuse of discretion in deciding the conflicting psychiatric reports issue. The lower courts ultimately decided to accept only one negligent expert's, Dr. Robinson, recommendation and rejected three other experts', including Dr. Wade's, more complete and credible recommendation that called for her reinstatement.

DISTRICT COURT'S ANSWER-"The undisputed facts establish that Brown received more than the minimum due process . . . Brown was given the opportunity to respond by undergoing a psychiatric examination by Dr. Mattye Glass, a psychiatrist of her choosing. The conclusion of Dr. Glass was that medical health leave was appropriate and Brown should be restricted from the classroom.". (Tr. Vol. 1, p. 49).

Brown adequately raised many disputing issues in the record. Brown made it clear in her pleadings that her evaluating psychiatrist, Dr. Robinson and not Dr. Glass, performed a negligent diagnosis without a battery of tests. The district court misapprehended Dr. Glass as being Brown's evaluating psychiatrist. Is this error relevant? Yes, the district court tried and decided the conflicting psychiatric reports issue with wrong information. In addition, Brown communicated to the district court that Dr. Wade and others, with psychological testing, found no mental disorder and recommended reinstatement. (Tr. Vol. 1 pp. 10, 17, 27, 35, 74, 95, 96, 222, 241, 253, 254, 563, 564).

The record shows that Judge Harmon never mentioned Dr. Wade's name or anything about a second psychiatric evaluation. The district court never mentioned the disputed fact of whether Brown suffers from a mental disorder; 3 experts claims there is no mental disorder and one expert said Brown is irrational and should be removed from the classroom. The evaluation and testing led to Dr. Wade who concluded: "Miss Brown does not appear to fulfill the requirement for any mental disorder as described in the DSM III-R. As such, there is no apparent reason from a psychiatric standpoint to preclude her returning to her job." Brown has raised the negligence issue concerning Dr. Robinson's failure give Brown a battery of tests. Issue of negligence makes summary judgment improper. North American Co. For Life & Health v. Berger 648 F.2d 305 (5th Cir. 1981). Insurance company sued a psychiatrist because of negligent diagnosis.

5TH CIRCUIT'S ANSWER

"Dr. Glass felt that a third opinion was as yet unwarranted because Dr. Wade had qualified his recommendation by stating that it was "based solely on one clinical examination and testing, and does not include information from other sources which may provide additional insight into this situation." Id.

Dr. Glass said that she would provide information to Dr. Wade from the HISD, if Ms. Brown so requested, and if

Dr. Wade reached the same conclusion then "it may be necessary to obtain a third opinion." (Appendix A, p. 5)

The 5th Circuit erred in applying Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). The facts from the record indicate there were conflicting psychiatric reports. The district court and the 5th Circuit improperly weighed the conflicting evidence and resolved the conflicting psychiatric reports issue against Brown who opposed the motion for summary judgment. FRCP 56(c); Rosenthal v. Rizzo, 555 F.2d 390 (3rd Cir. 1977). The Supreme Court has mandated that the record, issues, etc. should be "examined in the light most favorable to the plaintiff opposing the motion". Poller v Columbia Broadcasting System 368 US 464, 7 L Ed 2d 458, 82 S Ct. 486 (1962); United States v. Diebold, Inc., 369 US 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). Both the 5th Circuit and the district court were making a finding of fact based on conflicting psychiatric reports. Summary judgment is not a substitute for the trial of fact issues. Accordingly, neither the district court or the 5th Circuit can try issues of material fact on a Rule 56 motion but only is empowered to determine whether there are issues to be tried. Both the 5th Circuit and the district court resolved this issue against the opposer

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of the motion. This is error. To that end we must "review the facts drawing all inferences most favorable to the party opposing the motion." Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). Therefore, could not had the 5th Circuit more justifiably rejected Dr. Robinson's recommendation over Dr. Wade's? 5th Circuit made it clear that the court should had viewed the record or the conflicting psychiatric reports in light most favorable to the non-moving party according to Swilley v. Alexander, 629 F.2d 1018 (5th Cir. 1980). Again, the 5th Circuit deviated from earlier holdings. The Supreme Court's authority is required to mandate justice using existing law.

Substantial evidence should had swayed the lower courts toward accepting Brown's THREE expert witnesses and rejecting the defendant's ONE expert witness. After all, consider the experts' evidence and procedure in evaluating Brown.

Brown's three expert witnesses called for her immediate reinstatement. Dr. John Wade's assessment of Brown included (1) clinical examinations (2) battery of tests (3) standard used-DSM III-R (4) other psychological experts' recommendation.

The defendant's only expert witness, Dr. Estella Robinson's recommendation called for Brown to be removed from the classroom. Dr. Robinson assessment consisted of only one clinical examination. Oddly, no standard such as the DSM III-R was used by Dr. Robinson. She simply stated her opinion. Surprisingly, Dr. Robinson used no safeguards to back or substantiate her recommendation. She used no other professional experts or psychological testing to back her opinion. Even without safeguards or a standard, Dr. Robinson suggested to Brown that she check into a mental hospital. (Tr. Vol. 3, p. 470). This really scared Brown. Dr. Robinson appeared 'green' in not using other resources beside her personal opinion of Brown. Summary judgment should not had been granted considering the issue of Dr. Robinson's negligence. North American Co. For Life & Health v. Berger, 648 F.2d 305 (5th Cir. 1981). Then why did the 5th Circuit and the district court 'accept' and 'used' Dr. Robinson's negligent evaluation? The defendant, district court, and the 5th Circuit essentially rejected Dr. Wade's recommendation. Their actions are contrary to Daury. As soon as Daury's school district received a psychiatric report favorable to Daury, Daury was immediately reinstated. In

addition, Daury was immediately reinstated even with his doctor basing his opinion only on Daury's account. Daury v. Smith, 842 F.2d 9(1st Cir. 1988). This 5th Circuit's decision to ignore or reject Dr. Wade's recommendation is definitely contrary to Daury. The 5th Circuit tried the conflicting psychiatric reports and ruled in favor of the moving party. Brown, the non-moving party, should had been given the benefit of any doubt that may had existed. Clearly, this is error. Supervision by the Honorable Supreme Court is required; the lower courts have misapplied or misinterpreted existing authority. The Supreme Court guidance and direction is needed to prevent 'anything goes syndrome'.

The 5th Circuit and district court also erred in not considering the motive or intent behind HISD's decision to accept Dr. Robinson's negligent and incomplete recommendation and yet rejected the quality evaluation of Dr. Wade. How could HISD accept Dr. Robinson's assessment and then turn around and reject Dr. Wade's recommendation? This is evidence that HISD was not attempting to be fair and just; their motive and intent was simply to get rid of Brown. What was HISD's motive in

referring Brown five days after she protested to police , rejecting Dr. Wade's and others' recommendations for reinstatement, and then accepting Dr. Robinson's negligent psychiatric evaluation? This circuit made it clear that summary judgments are ill-suited for credibility assessments, motive, and intent. Honore v. Douglas, 833 F.2d 570 (5th Cir. 1987); Jones v. West. Geophysical Co. of Amer., 669 F.2d 280 (5th Cir. 1982) The 5th Circuit wrote "When dealing with employment discrimination cases, which usually necessarily involve examining motive and intent, as in other cases which involve delving into the state of mind of party, granting of summary judgment is especially questionable." Hayden v. First National Bank of Mt. Pleasant, Texas, 595 F.2d 994 (1979); Foster v. Swift & Co., 615 F. 2d 701 (5th Cir. 1980). Summary judgments have a place . . . , though, . . . they are not appropriate "where motive and intent play leading roles." The White Motor Company v United States, 372 US 253, 9 L Ed 2d 738, 83 S Ct. 696. Poller v Columbia Broadcasting System 368 US 464 at 459, 7 L Ed 458.

HISD only accepted Dr. Robinson's evaluation because she recommended Brown be removed from the classroom. HISD did not accept Dr. Robinson's recommendation because

they felt she did a thorough job; they accepted the negligent psychological evaluation to support their need to get rid of Brown using any means. HISD did not reject Dr. Wade's recommendation because of credibility; but HISD rejected Dr. Wade's recommendation because he called for immediate reinstatement.

Attorney Horner 'conveniently' avoided the issue of conflicting psychiatric reports and did not discuss the district court's error of considering Dr. Glass as Brown's evaluating psychiatrist. This issue was raised in the record (Tr. Vol. 1, pp. 10, 17, 27, 35, 95, 96; Vol. 2, pp. 240, 241); (Appellant's, pp. 29-31).

ANSWER FROM DEFENDANT-The Respondent's attorney did not mention Dr. Wade's name, but acknowledged a 2nd psychiatric report.

"In February of 1990, she met again with Dr. Glass and presented reports from a clinical psychiatrist and a counselor allegedly refuting the District's determination. After consideration of the evidence and response made by the Plaintiff, Dr. Glass decided to keep the Plaintiff on medical health leave. because Dr. Glass did not consider the evidence presented by the Plaintiff to be sufficiently reliable to justify changing the original decision." (Tr. Vol. 1, p. 193)

Attorney Horner failed to acknowledge that there were conflicting recommendations even though he addressed only irrelevant sections from both reports. He wilfully omits that

one psychiatrist and two other psychological experts suggested that Brown be reinstated; while one psychiatrist suggested that Brown is not mentally fit to remain in the classroom. Horner wrote in the Appellee's brief that 'additional insight' was required for Dr. Wade's recommendation. The defendant befuddled this issue "The opinion of the Appellant's "experts" by their own admission, was based solely on one set of standardized tests, and did not include other information that could have provided "additional insight". (R. p. 253)" (Appellee's, p. 26) Why would Dr. Wade risk his reputation if his original recommendation had not been supported by other sources and safeguards? Horner and Dr. Glass claimed that Dr. Wade did not receive all of information from HISD. Recall what the 5th Circuit claimed about Dr. Wade's recommendation "based solely on one clinical examination and testing, and does not include information from other sources which may provide additional insight into this situation." (Appendix A, p. 5) Brown made clear in the record that Brown's experts saw her on at least 5 occasions and the defendant's expert witness saw Brown on only one occasion. Yet, the lower courts accepted the defendant's

expert witness. Both the 5th Circuit and the defendants argued about the "additional insight" Dr. Wade needed. But, the BOTTOM LINE is that neither did HISD have all of the information or 'additional insight' to give Wade or Robinson. After all, HISD did not give plaintiff an opportunity to defend herself or to express her side of the story. HISD would never be able to furnish Wade or Robinson with "additional insight" until Brown is given a full hearing for her 'side of the story' to be told.

The 5th Circuit again holds that courts should use summary judgment most sparingly in First Amendment cases involving delicate constitutional rights, complex fact situations, disputed testimony and questionable credibilities. Porter v. Califono, 592 F.2d 770 (5th Cir. 1979).

In conclusion, Brown respectfully prays that this Honorable Supreme Court will grant this Petition For Writ of Certiorari. The lower courts left Brown exhausted and hanging on 'indefinite medical leave'. How long will she hang? Constitutional questions have not been put to rest. Brown appreciates this God-given opportunity to be able to seek redress. Restore hope and justice to Brown, teachers, lawyers, and the American people.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of June, 1992, a true and correct copy of Petition For Writ of Certiorari has been forwarded to

Attorney Jeffrey Horner
Bracewell & Patterson
2900 South Tower Pennzoil Place
Houston, Texas 77002

Marvinell Brown

Marvinell Brown, PRO SE
5611 Westward #66
Houston, Texas 77081

BEFORE ME, the undersign authority, on this day personally appeared MARVINELL BROWN, known to me to be the person whose name are subscribed to the foregoing instrument and acknowledge to me that she executed the same for the purpose and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 23RD day of JUNE, 1992.

HELEN GRACE ALLAS
Notary Public, State of Texas
My Commission Expires 12-1-93

Helen Grace Allas
Notary Public in and for the
State of Texas

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 91-2634
Summary Calendar

MARVINELL BROWN,

Plaintiff-Appellant,

VERSUS

HOUSTON INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-89-908)

(February 25, 1992)

Before JONES, DUHE, and WIENER, Circuit Judges.

PER CURIAM:(1)footnote

The Plaintiff in this case, Marvinell Brown, feels that she was unconstitutionally placed on medical leave from her job as a high school teacher. Because we conclude that Ms. Brown presented no genuine issues of material fact on her constitutional, federal statutory, or state law claims, we affirm the summary judgment render for the Defendant.

Footnote (1) Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

As a preliminary matter, there are a number of outstanding motions before this Court. We have previously granted Ms. Brown's motion to file a brief not in excess of fifty-seven pages but denied her motions for appointment of counsel and injunctive relief. Her "Motion for Leave to File a Reply Brief in Excess of the Page Limitation" remains to be ruled on. The Appellee, Houston Independent School District, has moved to strike her reply brief and the addendum to her original brief. Because of our desire to be sure that we understand all of the arguments of Ms. Brown, who is currently proceeding without counsel, we grant her motion and deny the HISD's motions. We hasten to add that Ms. Brown should not feel free to ignore our page limitations in the future. She has imposed a ponderous and unwarrranted burden on opposing counsel and this Court, and we admonish her to adhere strictly to our rules if she should ever have occasion to file papers before this Court again.

II.

A.

Ms. Brown has been a tenured teacher with the Houston Independent School District, but her principal, J. Don Jones, became concerned that her emotional health was interfering with her ability to continue in the classroom. He therefore referred Ms. Brown to the HISD's Health Services office and listed the following perceived "behavior patterns":

1. Explodes with administration-unprofessional behavior

2. Fears someone is going to harm her

3. Refusal to be observed

4. Fears that she might lose control

5. Some days she appears to be alert and on others she appears to be detached.

6. Multiple incidents of the Panic button being pushed in her classroom

7. Unprofessional behavior - dialing 911 because of a poor assessment. She filed the complaint in Dr. Jones's and her name against Anne McClellan, Assistant Principal, for assault.

1 R. 172. Reason number 7 refers to an incident in which Ms. Brown called the police because Ms. McClellan gave her a bad evaluation; Ms. Brown felt that she was the victim of discrimination.

Ms. Brown's calling the police apparently precipitated the referral to Health Services. Mattye Glass, director of that bureau, told Ms. Brown that she should be evaluated by a psychiatrist of her choice. The psychiatrist whom Ms. Brown chose, Estella Robinson, recommended that Ms. Brown be restricted from the classroom until further evaluation and treatment, and Dr. Glass accordingly recommended that Ms. Brown be placed on health leave.

After she was referred to Health Services but before she chose a psychiatrist, Ms. Brown was told of the reasons for the referral. After she was placed on leave, she was informed in a letter of her "right to present testimony or other information of relevance pertaining to your fitness to continue as a teacher." Id. at 183. As a result of this letter, Ms. Brown again met with Dr. Glass to voice her concerns and to present letters from another psychiatrist, John Wade, and other professionals. Dr. Wade concluded that "Miss Brown does not appear to fulfill the requirement for any mental disorder as described in the DSM III-R. As such, there is no apparent reasons from a psychiatric standpoint to preclude her returning to her job." 2 id. at 253.

Dr. Glass felt that a third opinion was as yet unwarranted because Dr. Wade had qualified his recommendation by stating that it was "based solely on one clinical examination and testing, and does not include information from other sources which may provide additional insight into this situation." Id. Dr. Glass said that she would provide information to Dr. Wade from the HISD, if Ms. Brown so requested, and if Dr. Wade reached the same conclusion then "it may be necessary to obtain a third opinion." 1 id. at 185-86. The record does not show any further involvement by Dr. Wade, however.

After filing complaints with the Equal Employment Opportunity Commission, Ms. Brown received two right-to-sue notices, dated September 6, 1988, and June 28, 1989. She filed this suit in district court on March 20, 1989. After considerable pretrial proceedings, the district court entered summary judgment for the Defendant on January 17, 1991. Ms Brown thereafter filed a number of motions to reconsider. Her Notice of Appeal was filed the same day as a pleading entitled, "Second Motion for Reconsideration of Granting of Defendant's Motion for Summary Judgment &

Motion for Oral Hearing" and is proper under Brown v. United Insurance Co. of America, 807 F.2d 1239, 1242 (5th Cir. 1987).

III

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Cov. P. 56(c). In reviewing the summary judgment, we apply the same standard of review as did the district court. Waltman v. International Paper Co., 875 F. 2d 468, 474 (5th Cir. 1989); Moore v. Mississippi Valley State Univ., 871 F.2d 545, 548 (5th Cir. 1989). The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no genuine issue of material fact remains. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). To that end we must "review the facts drawing all inferences most favorable to the party opposing the motion." Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 575, 587 (1986).

Ms. Brown has based her suit on a number of different legal theories. We address in turn each of her remaining claims that are legally cognizable. Ms. Brown makes a number of arguments that, as best we can deduce, do not constitute legally cognizable causes of action. We do not discuss these argument. Also, a party that inadequately briefs an issue is considered to have abandoned the claim. Villanueva v. CNA Ins. Cos., 868 F. 2d 684, 687 n.5 (5th Cir. 1989); Harris v. Plastics Mfg. Co., 617 F. 2d 438, 440 (5th Cir. 1980). We therefore do not discuss any claim she may or may not have under 42 U.S.C. § 1981 (1988).

A.

Ms. Brown contends that the HISD violated her right to procedural due process under the Fourteenth Amendment. Under Cleveland Board of Education v. Loudermill, a public employee with a property right in continued employment is entitled to "notice and an opportunity to respond." 470 U.S. 532, 538, 546 (1985). The HISD does, not dispute that Ms. Brown had a property

right and was due some process, its argument is that she was given all the process she was due. We agree. Ms. Brown was given notice of the reasons for her referral and her subsequent placement on health leave. She was afforded the opportunity to give Dr. Glass her perspective on the events leading to the concern for fitness to teach. She was allowed to present evidence to Dr. Glass, and we note that Dr. Glass acknowledged that if Ms. Brown pursued evaluation further, then a third psychiatric opinion might have been warranted. In short, she was given pretermination notice and hearing, and the HISD acted reasonably.

We understand that Ms. Brown would have liked to have been given the reasons for referral sooner, and would have preferred an earlier, more elaborate hearing. But both notice and an opportunity to present her side to Dr. Glass were given before her salary payments were stopped and before she was terminated. As far as the record shows, in fact, Ms. Brown still has not been terminated. Even if we assume, for the sake of argument, that the Due Process Clause would be implicated by a cessation of salary payments without formal termination, the minimal procedural

June of 1989, during the pendency of her action, and she argues that her action may be maintained because of this second notice. After painstaking examination of the record, we understand her argument. We find that it is not legally meritorious, however.

Ms. Brown did not file the second notice in the district court before summary judgment. Nine days after that judgment was rendered, in January of 1991, she filed a "Motion that Court Grant Plaintiff an Opportunity to Re-Present Facts & an Extension," to which she appended the second right-to-sue notice. The motion and exhibits, however, appear to have been lost by the district court, and Ms. Brown is understandably upset by this clerical error.

Legally, though, even if there had been no clerical error, the letter would still have been filed too late. In order to state a claim upon which relief can be granted under title VII, a plaintiff must complain to the EEOC and obtain a notice of the right to sue. The Plaintiff must then file suit within ninety days. See Id. As the district court held, her suit was not timely filed relative to the first notice of a right to sue. When Ms. Brown received the second notice,

although her suit was already pending, she might have maintained her action by amending her complaint and filing the second notice within ninety days. See Pinkard v. Pullman-Standard, Div. of Pullman, Inc., 678 F.2d 1211, 1215 (5th Cir. Unit B 1982), cert. denied, 459 U.S. 1105 (1983). Because she failed to do so, and because the district court could not have considered the second notice before the court rendered summary judgment, Ms. Brown did not present a viable title VII claim to the district court. Summary judgment for the Defendant is therefore appropriate.

We understand that Ms. Brown was proceeding pro se for at least part of the time that she was litigating in the district, but there are a limited number of allowances that a court will make for pro se parties. The district court considered a number of Ms. Brown's motions after rendering summary judgment, and the court has discretion to grant or deny post-judgment motions of this sort. Although the first motion was lost, later motions by Ms. Brown brought the court's attention to the clerical error. We find no abuse of

discretion in the court's refusal to change its judgment.

E.

We now address the procedural issues pressed by Ms. Brown. The district court denied her motion to add defendants because it was untimely. Ms. Brown contends that the court's scheduling order was not in accord with Rule 21 of the Federal Rules of Civil Procedure. We disagree. Trial courts have broad discretion in regulating their dockets and imposing scheduling deadlines on litigants. E.g., Teal v. Eagle Fleet, Inc., 933 F.2d 341, 346 (5th Cir. 1991). We have examined the deadlines imposed by the court, and it did not abuse its discretion on either in setting them as it did or in denying Ms. Brown's untimely motion to add defendants.

Nor did the court abuse its discretion in allowing Ms. Brown's second attorney to withdraw. Ms. Brown filed numerous pro se motions while she was represented by her second attorney, refused to communicate effectively with her attorney, and filed a grievance with the state bar and the television media against her attorney. The district court properly allowed him to withdraw.

F.

Last, we address Ms. Brown's state law claims. Ms. Brown never created a genuine issue of fact as to whether the HISD breached its contract with her. Nor did she raise a fact issue that would have deprived the HISD of the immunity it enjoys under state law. See Barr v. Bernhard, 562 S.W.2d 844, 846 (Tex. 1978).

V.

For the reasons set out in part I, we GRANT Appellant's motion to file a reply brief in excess of the page limit and DENY Appellee's motions to strike. For the reasons expressed in the remainder of this opinion, we AFFIRM the judgment of the district court in all respects.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED JAN 17 1991
JESSE E. CLARK, CLERK
By Deputy: N. Smith

MARVINELL BROWN,
Plaintiff,

vs.) CIVIL ACTION NO. H-89-908

HOUSTON INDEPENDENT)
SCHOOL DISTRICT,)
Defendant.)

MEMORANDUM AND ORDER

Pending before the Court are the motion for leave to file supplemental complaint and to add defendants (#55) submitted by plaintiff, Marvinell Brown ("Brown"), and the motion for summary judgment (#56) submitted by defendant, Houston Independent School District ("HISD"). After considering the motions, the responses and the applicable law the Court is of the opinion that the motion for summary judgment and for leave to file a supplemental complaint should be granted and the motion to add defendants should be denied.

BEST AVAILABLE COPY

I. BACKGROUND

Plaintiff, Marvinell Brown ("Brown"), has been continuously employed by HISD since August 1984. In January of 1989, she was placed on medical health leave under HISD policy because HISD officials perceived that she suffered from emotional problems which interfered with and jeopardized the successful performance of her classrooms duties. Under the policy, such leave is paid until an employee exhausts all accumulated personal leave. At that point, the leave becomes unpaid. At no time has HISD terminated Brown.

In response Brown filed suit against HISD asserting causes of action for due process violations, racial discrimination, state law breach of contract, and state law tort claims. HISD now moves for summary judgment on all of these causes of action.

II MOTIONS TO FILE SUPPLEMENTAL COMPLAINT AND ADD DEFENDANTS

As an initial matter the Court notes that HISD does not oppose the motion to file a supplemental complaint, and although HISD has not answered the supplemental com-

plaint, it has been filed. For purposes of considering HISD's motion for summary judgment the Court shall look to the allegations contained in the supplemental complaint.

With regard to Brown's motion to add defendants, the Court observes that the time for adding parties stated in the scheduling order has lapsed. Furthermore, Brown offers no explanation for failing to add these parties within the time provided. Consequently, Brown's motion is untimely and should be denied.

III. THE STANDARD FOR SUMMARY JUDGMENT

Rule 56 (c) provides that "(summary) judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the

absence of genuine issue of material fact. Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 (1986). The moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgement as a matter of law. Williams v. Adams, 836 F.2d 958, 960 (5th Cir. 1988). The burden is not on the movant to produce evidence showing the absence of a genuine issue of material fact. See International Ass'n of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co., 812 F.2d 219, 222 (5th Cir. 1987). A defendant who moves for summary judgment may rely on the absence of evidence to support an essential element of the plaintiff's case. Id.

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. See Celotex, 106 S. Ct. at 2552-53. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing the existence of a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505,2514 (1986).

Assertions unsupported by facts are insufficient to oppose a motion for summary judgment. Williams v. Weber Management Serv., 839 F.2d 1039, 1041 (5th Cir. 1987) There must be evidence giving rise to reasonable inference that support the nonmoving party's position. St. Amant. v. Benoit, 806 F.2d 1294, 1297 (5th Cir. 1987). Bare or mere allegations are insufficient. Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc. 831 F.2d 77, 79 (5th Cir. 1987).

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. Anderson, 106 S. Ct. at 2513. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Id. at 2513. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Electric Ind. Co. v. Zenith Radio Corp., 106 S. Ct. 1348, 1356-57 (1986). Summary judgment is inappropriate if the evidence before the court, viewed as a whole, could lead to different factual findings and conclusions. Honore v. Douglas, 833 F.2d 565, 567 (5th Cir. 1987).

IV. DUE PROCESS CLAIMS

Brown alleges that she has been deprived of property without the constitutional protection provided by the Due Process Clause. Specifically, she claims that by being placed on unpaid medical health leave by HISD she was deprived of her property interest in continued employment. In addition, Brown claims that the manner in which she was placed on unpaid medical leave violated her due process rights.

HISD acknowledges that Brown, as a tenured teacher, has a property interest in her continued employment by HISD. Therefore, Brown's property right to continued employment is one to which the Due Process clause applies. See Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487, 1493 (1985). Having stipulated that a property right existed the issue is what process is due.

As the Supreme Court articulated in Loudermill (a) tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side

of the story . . . ." Id. at 1495. The undisputed facts establish that Brown received more than the minimum due process required under this standard.

Specifically, Brown was provided with written notice of the proposal to place her on medical leave, an oral explanation of the reasons for this action. Following the notification and explanation Brown was given the opportunity to respond by undergoing a psychiatric examination by Dr. Mattye Glass, a psychiatrist of her choosing. The conclusion of Dr. Glass was that medical health leave was appropriate and Brown should be restricted from the classroom. Accordingly, there being no genuine dispute as to the notice, explanation and opportunity to respond afforded Brown, the Court concludes that Brown received due process consistent with that mandated by Loudermill and HISD is entitled to summary judgment on this claim.

V. RACE DISCRIMINATION CLAIM

Brown also alleges that she was the victim of racial discrimination. She seeks damages under Title VII, section 1981 and section 1983. In pursuit of her Title VII claim Brown filed a claim with the Equal Employment

Opportunity Commission ("EEOC") concerning this allegation in January of 1988. In September of 1988, the EEOC found no reasonable cause to believe that Brown had been subject to racial discrimination, and issued a right-to-sue notification letter dated September 6, 1988. Brown did not commence this action until March of 1989.

After receipt of a right-to-sue letter, a Title VII litigant must commence her action within ninety (90) days. The Supreme Court has held that compliance with the filing deadlines enunciated under Title VII is a jurisdictional prerequisite, and the failure to comply is ground for dismissal. (cite). Because Brown has failed to satisfy this jurisdictional prerequisite, HISD is entitled to judgment on this claim as a matter of law.

Brown's claims under section 1981 must likewise fail. In Jett v. Dallas Independent School District, __U.S.___, 109 S.Ct. 2702 (1989), the Supreme Court held that governmental entities, such as school districts, can no longer be held liable under section 1981. Id. 2722. Instead, section 1983 provides the exclusive remedy for the rights guaranteed by section 1981 when the claim is pressed

against a state actor. Id. Therefore, Brown's allegation under section 1981 fail to state a claim upon which relief may be granted and HISD is entitled to summary judgment as a matter of law.

An education institution may not be held liable for constitutionally deficient acts of its employees under the doctrine of respondeat superior. City of St. Louis v. Praprotnick, 485 U.S. 112 (1987). Rather, to state a claim against an educational institution under section 1983 for acts of subordinate employees, a plaintiff must allege that officials acted in accordance with an official government policy or firmly entrenched custom that deprived the plaintiff of constitutional rights. See Worsham v. City of Pasadena, 881 F.2d 1336, 1339 (5th Cir. 1989) (citing Monell v. City of New York Dept. of Social Services, 436 U.S. 658, 694 (1978)).

The Fifth Circuit has held that to establish "an official government policy or firmly entrenched custom" a plaintiff must show that the constitutional deprivation was inflicted by:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially

adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributed to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined. Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984).

Brown's complaint is devoid of any allegation that the claimed constitutional deprivations were the result of an official government policy or firmly entrenched custom. Consequently, Brown has failed to state a claim under section 1983 upon which relief may be granted.

VI. STATE LAW TORT CLAIMS

Brown asserts pendent state tort claims alleging intentional infliction of emotional distress, wrongful discharge, tortious interference with business relations and defamation. In response HISD seeks summary judgment under the doctrine of governmental immunity.

Under Texas law a school district exercising governmental functions is an agency of the state and is immune from suits predicated on the torts of its employees, except as specifically provided in the Texas Tort Claims Act.

See Hopkins v. Spring Independent School District, 736 S.W.2d 617 (Tex. 1987); Barr v. Bernhard, 562 S.W.2d 844 (Tex. 1978). Because Brown has not brought any of her claims within any of the exceptions articulated in the Texas Tort Claims Act, HISD is entitled to summary judgment on each of Brown's state law tort claims as a matter of law.

VII. BREACH OF CONTRACT

Finally, Brown asserts a claim for breach of contract, alleging that HISD breached its contract with her by placing her on medical health leave. The undisputed facts establish that Brown was placed on medical health leave consistent with the terms and conditions of her contract. There being no evidence of breach on the part of HISD, it is entitled to judgment as a matter of law.

ORDER

In accordance with the foregoing, it is

ORDERED that plaintiff's motion to reinstate is hereby **GRANTED**. It is further

ORDERED that plaintiff's motion for leave to file supplemental complaint is hereby GRANTED. It is further

ORDERED that plaintiff's motion to add defendants is

hereby **DENIED**. It is further

ORDERED that defendant's motion for summary judgment is hereby **GRANTED**.

Signed this 16th day of January, 1991.

/s/ Melinda Harmon

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 91-2634

U.S. COURT OF APPEALS
FILED MAR 31 1992
GILBERT F. GANUCHEAU, CLERK

MARVINELL BROWN,

Plaintiff-Appellant,

VERSUS

HOUSTON INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 2-25-92, 5 Cir., 198_, _____F.2d____)

(March 31, 1992)

Before JONES, DUHE, and WIENER, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( )Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ John N. Duhe

United States Circuit Judge

REHG-8

FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The First Amendment to the United States Constitution to the United States Constitution reads as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abriding the freedom of speech, or of press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Fourteenth Amendment of the Constitution provides in part, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX D

TITLE VII

42 U.S.C. § 2000e-2

"It shall be unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. § 2000e-3(a)

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling

apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter (42 U.S.C. §§ 2000e to 2000e-17), or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter (42 U.S.C. §§ 2000e to 2000e-17)."

FEDERAL RULE OF CIVIL PROCEDURE 56 (c)"The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Title 42 USC § 1983 provides in full: "Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. § 1981 "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains penalties, taxes, licenses, and exactions of every kind, and to no other."

APPENDIX F

Texas Education Codes

§ 13.107 Each teacher with whom a continuing contract has been made as herein provided shall be entitled to continue in his position or a position with the school district, at a salary authorized by the board of trustees of said district complying with the minimum salary provisions of the foundation aid law, for future school years without the necessity for annual nomination or reappointment, until such time as the person:

(3) is discharged for lawful cause, as defined in Section 13.109 of this code and in accordance with the procedures hereinafter provide:

13.111 Notice

"(a) Before any teacher shall be discharged during the year for any of the causes mentioned in Section 13.109 of this code, ...or before any teacher holding a continuing contract shall be dismissed or returned to probationary contract status at the end of a school year for any, of the reasons mentioned in Section 13. 110 of this code, he shall be notified in writing by the board of trustees or under its direction of the

proposed action and of the grounds assigned therefor.

(b) In the event the grounds for the proposed action relate to the inability or failure of the teacher to perform his assigned duties, the action shall be based upon the written recommendation by the superintndent of schools, filed with the board of trustees. Any teacher so discharged or dismissed or returned to probationary contract status shall be entitled, as a matter of right, to a copy of each and every evaluation report, or any other memorandum in writing which has been touching or concerning the fitness or conduct of such teacher, by requesting in writing a copy of the same."

§ 13.112 Hearing

"(a) If, upon written notification of the proposed action, the teacher desires to contest the same, he shall notify the board of trustees in writing within 10 days after the date of receipt by him of the official notice above prescribed, of his desire to be heard, and he shall be given a public hearing if he wishes or if the board of trustees determines that a public hearing is necessary in the public interest.

(c) Within 10 days after request for hearing made by the

teacher, the board of trustess shall fix a time and place of hearing, which shall be held before the proposed action shall be effective. Such a hearing shall be public unless the teacher requestsin writing that it be private.

(d) At such hearing, the tesher may employ counsel, if desired, and shall have the right to hear the evidence upon which the charges are based, to cross-examine all adverse witnesses, and to present evidence in opposition thereto, or in extenuation."

§13.905

"(c) The governing board of a school district may adopt a policy providing for placing an employee on leave of absence for temporary disability if, in their judgment and in consultation with a physician who has performed a thorough medical examination of the employee, the employee's condition interferes with the performance of regular duties.

(f) The length of leave of absence for temporary disability shall be granted by the superintendent as required by the individual employee. The governing board of a school district may establish a maximum length for a leave ofabsence for temporary disability, but in no event shall that maximum be set at less than 180 days."

Lawyers grow reluctant to take job bias cases

By STEVEN A. HOLMES
New York Times

ALBANY, Ga. — John Henry Smith Sr., a black employee of the Dougherty County Health Department, wanted to sue his employer with a claim of racial bias when he was passed over for a promotion.

But, like an increasing number of people who want to file such suits, he could not afford the upfront cost of a lawyer and could not find one willing to take his case on a contingency basis.

He tried several lawyers in Albany, Ga. Then he tried in Athens, Atlanta, Columbus and Macon. The last one turned him down two weeks before the statute of limitations on his case was to run out.

Frantic, Smith decided to represent himself, though he is a high school dropout with a General Educational Development certificate. So far, by spending late nights in the local courthouse library, reading law books, Smith has managed to file the necessary court papers.

"It takes a whole lot of time 'cause you don't know what you're doing," he said. "But you kind of educate yourself as you go along."

As the nation wrestles intellectually and politically with the issue of civil rights, the legal system appears to be growing increasingly inhospitable toward individual race and sex discrimination cases.

Lawyers more and more are turning away such cases, say experts in employment law and lawyers representing plaintiffs and employers.

They say the cases are time-consuming, difficult to win and bring far less money than other civil litigation like personal injury suits, which permit punitive damages.

Lawyers say, moreover, that they face increasingly conservative judges who are bored by, if not downright hostile to, such cases.

While much of the evidence is anecdotal, a survey conducted in May by the National Employment Lawyers Association, a group made up of about 1,000 lawyers for plaintiffs, found that 44 percent of its members rejected more than 90 percent of the job-discrimination cases that had been brought to them.

Last year, a committee of lawyers and judges appointed by Congress to study the federal court system noted that the monetary stakes in some job-discrimination cases might be so small that "even with the potential to recover attorneys fees, claimants sometimes find it difficult to litigate in federal court because they cannot find counsel to take their cases."

Sometimes, but not often, plaintiffs who cannot find lawyers receive court-appointed counsel. Sometimes they then elect to represent themselves, though they tend to be unschooled in the legal complexities.

"They're getting killed in court," Dallas civil rights lawyer Jeanette Johnson said of the poor blacks and women who represent themselves. "It's like sheep to the slaughter."

Most often, experts say, those who seek to bring such cases simply abandon the thought of getting any redress in the federal courts.

"What happens is that they end up not being able to enforce their rights," said Lex Larson, president of Employment Law Research, a North Carolina concern that publishes manuals on labor law. "They go out and find another job, and forget the whole thing."

Experts say the growing reluctance of lawyers to take on job-bias claims is a trend that was intensified by a number of Supreme Court decisions making it harder for plaintiffs to bring such cases.

A bill to reverse these decisions has been stalled in Congress by a dispute over whether it would compel employers to adopt hiring and promotion quotas.

Many lawyers say they are hampered by two high court decisions.

The first, in 1982, limited their ability to bring large and potentially lucrative suits on behalf of whole classes of plaintiffs; the second, in 1989, virtually barred them from winning large monetary awards in race-discrimination suits, except those involving hiring.

Plaintiffs' lawyers also say they end up representing small individual claims brought by poor or working-class blacks or women who often cannot pay their normal rates. If they prevail, they often end up squabbling with judges over how much the losing party must pay them in fees.

"It's extremely difficult to earn a living in employment discrimination, virtually impossible," said Martha Pearson, an Atlanta lawyer.

APPENDIX H

92-170

NO.

Supreme Court, U.S.
FILED
JUL 21 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1992

MARVINELL BROWN,

Petitioner,

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Houston Independent
School District

QUESTIONS PRESENTED

I. Whether the Petitioner is entitled to a writ of certiorari.

II. Whether the trial court and the Fifth Circuit Court of Appeals properly granted and affirmed summary judgment for the Respondent, based upon the insufficiency of the Petitioner's claims as a matter of law.

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SUMMARY OF ARGUMENT

I. The Petitioner is not entitled to a writ of certiorari. Certiorari is granted only for the purpose of resolving unsettled, unique or unusually significant questions of law. The Petitioner's case involves well-settled principles of law that were properly applied by the courts below. The Petitioner's request for a writ of certiorari should be denied.

II. The Petitioner's claims all fail as a matter of law, and the courts below properly granted and affirmed summary judgment for the Respondent.

Specifically, the Petitioner received notice and an opportunity to be heard concerning her referral for medical

evaluation; thus, her due process claim fails. Her claim under 42 U.S.C. § 2000e et seq. (Title VII) is without merit because it was not timely asserted. The Petitioner's first amendment retaliation claim fails because the allegedly protected speech related only to a matter of private, rather than public, concern.

The Respondent was likewise entitled to summary judgment on the residual claim raised by the Petitioner, namely "reasonable basis for referral," which is not a legally cognizable claim upon which relief may be granted. Thus, the Respondent was clearly entitled to judgment as a matter of law on all legal claims raised in the Petition for Writ of Certiorari.

ARGUMENT AND AUTHORITIES

I. PETITIONER IS NOT ENTITLED TO A WRIT OF CERTIORARI

Rule 10 of the Rules of the United States Supreme Court specifies that a petition for writ of certiorari will be granted only when there are special and important reasons therefor. No such reasons are presented in this case. Certiorari is generally granted to resolve a split of authority among the circuit courts of appeal, or to resolve major unsettled questions of federal law. In contrast, the law governing the Petitioner's case is well-settled, and her case was properly disposed of by the trial court and the Fifth Circuit Court of Appeals.

This Court exists to serve as the final arbiter of important questions of major legal significance. Watt v. Alaska, 451 U.S. 259, 101 S.Ct. 1673 (1981), fn. 5. It is irrelevant that a question is of importance to a particular party; this Court limits its review to questions of broad importance. Rice v. Sioux City Cemetery, 349 U.S. 70, 75 S.Ct. 614 (1955). There are no questions of broad importance presented in this case, nor are there any difficult or unsettled questions of law.

The courts below acted in accordance with Supreme Court and other legal precedent in granting and affirming summary judgment for the Respondent. An examination of the record demonstrates

that the trial court and the Court of Appeals followed standard judicial procedure in handling this case, and correctly found that the Respondent was entitled to summary judgment as a matter of law on all issues. It is inappropriate to grant a writ of certiorari in this matter, and the Petitioner's request should be denied.

II. THE PETITIONER'S CLAIMS FAIL AS A MATTER OF LAW:

A. DUE PROCESS

The Petitioner alleges that she has been deprived of property and liberty under the due process clause of the United States Constitution. Specifically, she claims that in the process of being placed on medical health leave, she was deprived of property

without constitutionally sufficient procedural safeguards to contest the alleged deprivation.

The seminal case in this area is Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487 (1985). In Loudermill, this Court held: "A tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." 105 S.Ct. 1487, 1495.

Furthermore, this Court has held that the judgments of local school officials in making personnel decisions should be given great deference, so long as some type of pre-suspension or

termination process is provided to affected employees. The Court held in Wood v. Strickland, 420 U.S. 76, 95 S.Ct. 992 (1975): "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." 95 S.Ct. 992, 1003.

In the present case, the Petitioner was given more due process than was constitutionally required prior to being placed on medical health leave. (R., p. 167-168). The summary judgment evidence demonstrated that the Respondent provided the Petitioner with notice of the proposal to place her on medical health leave, an explanation of the reasons for this action, and the opportunity to

respond to the allegations. In its order affirming the granting of summary judgment to the Respondent, the Fifth Circuit stated:

> Ms. Brown was given notice of the reasons for her referral and her subsequent placement on health leave. She was afforded the opportunity to give Dr. Glass her perspective on the events leading to the concern for fitness to teach. She was allowed to present evidence to Dr. Glass, and we note that Dr. Glass acknowledged that if Ms. Brown pursued evaluation further, then a third psychiatric opinion might have been warranted. In short, she was given pretermination notice and hearing, and the HISD acted reasonably. (Petition for Writ of Certiorari, p. A-8.)

The Respondent was entitled to summary judgment on the Petitioner's due process claim in accordance with Loudermill and the other precedents of

this Court. There is no basis to grant certiorari on this issue.

B. FIRST AMENDMENT - FREE SPEECH RETALIATION

The Petitioner claims that she was retaliated against for exercising her first amendment right to free speech. The Petitioner's first amendment claim was not asserted in her pleadings, and thus was not addressed by the trial court because it was not properly before the court. The Fifth Circuit was not obligated to consider the merits of this claim. In Singleton v. Wulff, 428 U.S. 106, 96 S.Ct. 2868 (1976), this Court stated: "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." 96 S.Ct. at 2877.

However, out of an abundance of caution the Fifth Circuit chose to address the merits of the Petitioner's first amendment claim, and properly found that it had no legal merit. The Petitioner's reliance upon Pickering v. Board of Education, 391 U.S. 572, 88 S.Ct. 1731 (1968) and Mount Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977), is without foundation. The Pickering and Mount Healthy cases both dealt with college teachers who were speaking on matters of public concern. Only speech based on matters of public concern is protected by the first amendment. See Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 (1983). In contrast, the speech that the

Petitioner claims led to retaliation related to her private concerns about the terms and conditions of her employment.

Specifically, the Petitioner claims that she was retaliated against after she called the Houston Police Department to complain about a negative evaluation. A complaint about a job evaluation places the Petitioner's speech squarely within the category of private concern. In its opinion, the Fifth Circuit stated the following:

> Even if we assume that the matters that moved Ms. Brown to call the police were matters of public concern, complaining about them to the police is communication that is of a private nature. Her First Amendment claim is therefore without legal merit. (Petition for Writ of Certiorari, p. A-9)

The Fifth Circuit correctly found that the Petitioner failed to state a viable first amendment claim under Connick v. Myers, supra. There is no basis for this Court to reconsider this first amendment issue, and her petition on this issue should be denied.

C. EQUITABLE TOLLING: RIGHT-TO-SUE

The Petitioner contends that the courts below should have considered her racial discrimination and retaliation claim under 42 U.S.C. § 2000e, et seq. (Title VII). The trial court properly did not consider this claim, because it was not raised in a timely fashion by the Petitioner. The Petitioner obtained two right-to-sue letters from the Equal Employment Opportunities Commission

(EEOC), dated September 6, 1988 and June 21, 1989. Only the first letter was filed with the trial court as part of the summary judgment record. Taking only this letter into consideration, the trial court found that the Petitioner's Title VII claim was untimely because it was not raised with the requisite time period after the issuance of the right-to-sue letter. (R., p. 50). The trial court granted summary judgment based on the first letter on January 16, 1991; the second right-to-sue letter relating to the Petitioner's Title VII claim was not filed with the court until <u>after</u> the granting of summary judgment. (Supp. R.). The trial court properly refused to consider the second right-to-sue letter.

The law requires that the issues raised in a right-to-sue letter be asserted within ninety (90) days from the date the letter is issued. 42 U.S.C. § 2000e, et seq. The timely assertion of claims arising from a right-to-sue letter is a jurisdictional prerequisite. See Shelley v. Bayou Metals, 561 F.2d 1209 (5th Cir. 1977). The Petitioner did not present the second right-to-sue letter to the trial court until approximately sixteen (16) months after issuance of the letter to her by the EEOC (Supp.R.), belated by any measure of time.

The Petitioner's reliance upon Zipes v. Transworld Airlines, Inc., 455 U.S. 393, 102 S.Ct. 1132 (1982) is misplaced. This case does not address in any way the

failure to file or timely present the issues raised in a right-to-sue letter with the trial court.

Furthermore, the summary judgment evidence submitted in this case established: (1) that the Petitioner was referred for medical evaluation for good cause, and (2) that the actions against the Petitioner had nothing to do with her race. (R., p. 152-154, 158-160). The Petitioner offered no summary judgment proof rebutting this evidence. She did not establish a prima facie case of racial discrimination or retaliation under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973). Thus, even if the Appellant had met the procedural requirement of timely filing

her right-to-sue letters with the trial court in a timely manner, she would not have evaded summary judgment. The Fifth Circuit properly upheld this conclusion, and this Court should not reconsider this issue.

D. CREDIBILITY ASSESSMENTS FOR SUMMARY JUDGMENT

This portion of the Petitioner's petition is somewhat unclear, but the Respondent will assume that the Petitioner claims the trial court below improperly granted summary judgment despite contested fact issues concerning her credibility assessments. This argument has no merit. The Petitioner attempts to create a fact issue concerning "conflicting psychiatric reports" regarding her placement on

medical health leave. This argument basically restates a portion of the Petitioner's due process argument, which is discussed above. For the sake of clarity, however, a brief synopsis of the due process provided to the Petitioner follows.

Dr. Mattye Glass, a psychiatrist employed by the Respondent, originally made the recommendation that the Petitioner be placed on medical health leave. The Petitioner was allowed to respond to this recommendation by obtaining an evaluation from another psychiatrist. (R., p. 177-178). The Petitioner was evaluated by Dr. Estelle Robinson, an independent psychiatrist chosen by the Petitioner herself. Dr.

Robinson also recommended that the Petitioner be placed on medical health leave. (R., p. 261). Based on this independent evaluation, the Petitioner was placed on medical health leave. (R., p. 182).

The "conflicting psychiatric report" that the Petitioner refers to is the result of psychological testing that the Petitioner took under the supervision of a clinical psychologist and his associates. The psychologist reported that the Petitioner's test results were not abnormal, but further stated that the results were "based solely on on one clinical examination and testing, and does not include information from other sources which may provide additional

insight into this situation." (R., p.253). The HISD's decision to keep the Petitioner on medical health leave despite this limited psychological report does not constitute a violation of the Petitioner's due process rights.

Under Wood v. Strickland, supra, the trial court properly declined to second-guess the HISD's decision to place the Petitioner on medical health leave. The only relevant inquiry concerning the Petitioner's psychiatric evaluations is whether the Petitioner was given the notice and opportunity to respond required by the Due Process Clause. The Petitioner was provided with all of the process due her; her petition on this issue should be denied.

CONCLUSION

The trial court correctly rendered summary judgment in this case, and the Fifth Circuit concurred. The record clearly demonstrates that none of the causes of action asserted by the Petitioner are legally sufficient to survive summary judgment. Furthermore, this case presents no unique, important or unsettled questions of law which justify review by this Court. Accordingly, the Respondent respectfully requests that the Court deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been forwarded to the Petitioner, by placing a copy of same in the United States Certified Mail, Return Receipt Requested, on this 21st day of July, 1992, addressed as follows:

Ms. Marvinell Brown
5611 Westward #66
Houston, Texas 77081

I further certify that I received the Petitioner's Petition for Writ of Certiorari on June 26, 1992, by hand delivery.

Jeffrey J. Horner
Kelly Fred

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No. 92-170

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

MARVINELL BROWN -
PETITIONER

VS.

HOUSTON INDEPENDENT SCHOOL DISTRICT -
RESPONDENT

REPLY BRIEF
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT (91-2634)

REPLY BRIEF TO BRIEF IN OPPOSITION

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Petitioner, Marvinell Brown, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals Fifth Circuit refusing to acknowledge there was not even minimum due process given before Brown was denied her property interest, liberty interest, and freedom of speech.

Respondent HISD's Brief in Opposition failed to 'put to rest' any of the questions raised by Petitioner. Plaintiff Brown finds it necessary to file this Reply Brief because of the Respondent's and lower courts' failure to address the reasons for referral and 'reasonable basis' for referral. Reply is also required because Respondent HISD raised a new issue by seeking to befuddle an established and proven fact-there was only one expert calling for Brown's removal from the classroom. Brown has alleged constitutional infirmity because of the arbitrary and capricious reasons with no nexus given. The Respondent has evaded these 'reasons' issues, numerous due process issues, and **left Brown hanging on the unsettled question of forced medical leave.**

HISD also failed to put the 1st and 14th Amendment issues to rest. The Fifth Circuit assumed Brown's speech

to police was of public concern but her protest to police and principals made communication to be private nature and not protected by the 1st Amendment. This is error. "A public employee does not forfeit his First Amendment protection against governmental abridgment of freedom of speech when he arranges to communicate privately with his employer rather than to express his views publicly. . . Pickering, Perry, and Mt. Healthy do not support the Court of Appeals' conclusion that private expression is unprotected by the First Amendment" Givhan v Western Line Consolidated School District, 439 US at 410 (1979).

The Respondent is seeking to confuse the Supreme Court by implying there was more than one professional calling for Brown's removal. The Respondent wrote "Dr. Mattye Glass, a psychiatrist employed by the Respondent, originally made the recommendation that the Petitioner be placed on medical leave. . . . Dr. Robinson also recommended that the Petitioner be placed on medical health leave." (Opposition Brief, p. 18) Throughout the opposition brief, Respondent attempted to befuddle an established fact-one expert for removal vs. three experts for reinstatement. Dr. Glass' function was only to determine whether Brown

should see a psychiatrist and to serve as a 'coordinator' of an evaluation. Explaining about the employee referral process, Glass substantiated this and wrote "An appointment for a conference is scheduled by the Bureau of Health with the referred employee. . .During the conference, the employee is informed if a medical evaluation is indicated. . . The referred employee may select a physician of choice approved by the Bureau of School Health." (Tr. p. 273) Glass carried out the above steps in Brown's case. This evidence proves the Respondent is wrong about the new 'two experts' issue. The record identifies Glass as a 'director'. Glass, Principal Dr. Jones, and HISD Janet Price (EEOC letter 3/17/89) wrote letters making it clear that based solely on Dr. Robinson's professional opinion Brown should be removed from the classroom. (Tr. 257, 267, 562) No where in the record is there indication that Dr. Glass called for Brown's removal. After the first conference, Glass stated "It has been recommended that Mrs. Brown receive a medical evaluation" (Tr. pp. 153 (affidavit), 174). Later, Glass clearly stated "It was the professional opinion of Dr. Robinson that Ms. Marvinell Brown should be restricted from the classroom until further evaluation".

(Tr. p. 257) Brown had not been given the reasons for referral until after she had her first conference with Glass. Consequently, Glass did not have enough information to even make any evaluation or recommendation. In a different letter, Glass stated a third evaluation may be warranted; this implies that Glass had not done an evaluation but only Robinson and Wade had. (Petition Writ p. A-8)

The Respondent attempted to further mislead the Supreme Court by claiming that Brown independently chose Robinson. This Reply Brief is needed to clarify that HISD rejected Brown's first choice of Psychologist Robert Bell and said she must select a psychiatrist. (Tr. p. 270). At that time there were only two black psychiatrists in Houston and Dr. Robinson was one of them.

Even though HISD evaded the reasons for referral issue, Brown has alleged the reasons were arbitrary and capricious, without a nexus or a reasonable basis. Because Brown did not know the reasons for referral, she was not able to defend herself to Glass. The Fifth Circuit wrote "After she was referred to Health Services but before she chose a psychiatrist, Ms. Brown was told of the reasons for the referral." (Petition Writ, p. A-4) This is true. Glass'

misstatement also proved Brown did not know the reasons for referral before actual referral: "I also provided Ms. Brown with the reasons why she had been referred" (Tr. p. 153) The record shows that as of December 5, 1988, about a week after Brown met with Glass, Brown still had not received reasons for referral. (Tr. p. 270) Therefore, proper notice was not given as required by Cleveland Bd. of Educ. v. Loudermill 470 US 532; 105 S Ct. 1487 (1985).

The 5th Circuit evidently misapprehended facts. Three psychological experts using testing, DSM III-R, and at least 5 observations recommended that Brown be reinstated; while only one psychological expert who used no safeguards such as testing, other professionals' opinions, DSM III-R standard, or even more than one observation (Tr. pp. 38, 261) recommended Brown be removed from the classroom because of 'irrational' thoughts. (Tr. pp. 10, 17, 27, 35, 74, 95, 96, 222, 241, 253, 254, 563, 564,) This is clearly error that this 5th Circuit affirmed summary judgment for the moving party based on these facts. The Supreme Court has mandated that the record, issues, etc. should be "examined in the light most favorable to the plaintiff opposing the motion". Poller v Columbia

Broadcasting System 368 US 464, 7 L Ed 458 (1962); United States v. Diebold, Inc., 369 US 654, 8 L Ed 2d 176 (1962).

It was not the function of the district judge or the Fifth Circuit judges, in ruling on a motion for summary judgment, to weigh evidence, assess credibility, or determine the most reasonable inference to be drawn from the evidence. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 106 S.Ct. 2505, 91 L. Ed. 2d 202 (1986).

Brown cited authority showing that summary judgment is not appropriate for settling 1st and 14th Amendment cases. (Petition Writ pp. 4, 26, 27, 29) "When a state directly impinges upon interests in free speech or free press, an opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards." Board of Regents v Roth, 408 US 564; 33 L Ed 2d 548 (1972). A hearing in court is required to address free speech issue. Bishop v. Wood 48 L Ed 2d at 998. With Brown's case, there is not even the appearance of justice-the lower court judges would not allow hearings or trial.

Neither the Respondent or the district court mentioned the word 'hearing' in their arguments; this makes sense because there was no hearing. Incorrectly deciding there was a hearing, the Fifth Circuit stated:

"Ms. Brown was given notice of the reasons for her referral and her subsequent placement on health leave. She was afforded the opportunity to give Dr. Glass her perspective on the events leading to the concern for fitness to teach. She was allowed to present evidence to Dr. Glass, and we note that Dr. Glass acknowledged that if Ms. Brown pursued evaluation further, then a third psychiatric opinion might have been warranted. In short, she was given pretermination notice and hearing" (Petition Writ, p. A-8)

Ironically, the Fifth Circuit had established that "After she was referred to Health Services but before she chose a psychiatrist, Ms. Brown was told of the reasons for the referral." (Petition Writ, p. A-4) So, proper notice or employer's evidence was not given. Cleveland Bd. of Educ. v. Loudermill 470 US 532; 105 S Ct. 1487

But Texas Education Code indicates that Brown should have been given a hearing before the HISD board, opportunity to hear the evidence upon which the charges are based, to cross-examine all adverse witnesses. (Petition Writ, pp. G-2, G-3) The Fifth Circuit lowered its standard when this court determined that conferences with Dr. Glass were 'due process hearings'. Why didn't this 5th Circuit use THEIR very own Wells and Levitt as a standard for

authority? Wells v. Dallas Independent School District 793 F.2d at 683 (5th Cir., 1986).

HISD resorted to unlawful means and committed constitutional violations to remove a 'good' tenured teacher. HISD forced Petitioner Brown on medical leave because of supposedly 'mental incapacity'. **How long will Brown hang on this forced 'medical leave'?** Because Brown has been forced to remain on 'medical leave' for nearly four years, the supervision of this Court is needed to determine the constitutionality of this forced and unsolicited medical leave. Brown is the only party that has addressed this 'forced medical leave' issue. Ironically, the Respondent and the 5th Circuit claimed Brown 'is' still an employee. BUT, Brown has been denied her property interest, liberty interest-no job, and her good name-a person free of mental illness. The Appeals Court even wrote "As far as the record shows, in fact, Ms. Brown still has not been terminated" (Petition Writ, A-8). HISD remains silent on this issue and has reason to remain silent because of their heinous intent; afterall, Brown has been gone from HISD for almost 4 years and the lower courts will not uphold the constitution. The supervisory powers of the Supreme Court

are needed to put to rest the **unsettled question of Brown's indefinite medical leave.** There have been no hearings; a 'communist style' coupe removed Brown without notice. Brown has been in the classroom since the 'removal'; nothing 'bad' occured. Currently unemployed, Brown has a bachelors degree in math and masters degree in computer literacy. There is no question that HISD's actions have been devastating to Brown's career. Some school is hurting because a math and computer literacy teacher has been denied her liberty to work. How long will Brown be left hanging on 'indefinite medical health leave'? Supreme Court's intervention is imperative.

ISSUES LOWER COURTS AND RESPONDENT FAILED TO ADDRESS

Due Process

(1) Lower courts used summary judgment to settle constitutional case--1st and 14th Amendments (2) District court's refusal to have a hearing or trial on the merits (Brown's Brief pp. 2, 6, 12, 16); (Tr. pp. 10, 12, 14, 89)

HISD's refusal to act on grievances (Brown's Brief p. 14). Principal Don Jones actually documented that Brown would not receive due process; he wrote "Under these

circumstances I will not proceed with your grievance until these matters are resolved." (Tr. p. 283). Brown has never been able to face her accuser- Principal Jones.

Superintendent-District I, Ruben Lopez, also denied Brown due process; he wrote "Please be advised that I do not plan to respond to your grievance until your medical problems are resolved in accordance to Houston Independent School District procedures" (Tr. p. 284).

Brown went to all levels to present her side. Brown even wrote to the Board asking for a hearing; she was ignored-no response from the Board. (Tr. pp. 110, 289, 290). The lower courts seemed unbothered and tolerate of the fact that Brown had no appeal or grievance rights. Brown has not been able to present her side as required by Cleveland Bd. of Educ. v. Loudermill 470 US 532.

Brown was denied counsel prior to adverse actions; Brown had asked Dr. Jones to wait until she obtained an attorney. (Brown's Brief p. 4); (Tr. p. 31)

Conferences held with Dr. Glass do not and cannot constitute due process hearings as 5th Circuit stated. How could the first conference with Glass be considered a hearing considering both the 5th Circuit and Brown have

acknowledged that Brown was not given reasons for referral until after conference with Dr. Glass? How could Brown defend against reasons that she was not told about until 2 weeks after the first conference? The other and last conference with Glass was for the sole purpose of Brown receiving documentation. Glass refused to give her copies. (Tr. p. 255).

Arbitrary & capricious reasons issue with no Nexus- Brown has been the only party that argued the reasonable basis, arbitrary & capricious reasons, and nexus issues. (Appellant's pp. 25, 26, & 27); (Tr. pp. 93, 94, 239, 266, 347) The lower courts overlooked these monumental issues. Brown gave evidence that the late reasons were merely manufactured, pretextual, and vague. Due process requires that the given reasons for adverse action be not vague; the reasons Jones gave are very unclear and have been rebutted. The 5th Circuit has stated that "vague charges permit conflicting inferences. . . .entry of summary judgment was therefore in error". Wells v. Dallas Independent School District 793 F.2d at 683. Brown was performing her teaching duties well; students were learning and performed well on tests. (Tr. pp. 262, 263, 264). Respondent has

made no claim that Brown was not performing her job adequately. (Tr. pp. 266, 347). The lower courts erred in not requiring a nexus in relation to HISD's removal of Brown; the reasons given by Jones revealed no nexus. (Tr. pp. 93, 239, 266, 267, 343, 352). The courts have insisted that there be a nexus between the teacher's behavior and its effect upon the school. Furthermore, this is a way of preventing to avoid the constitutional vice of vagueness, and as a way of assuring that the basis of the adverse action is rationally related to the legitimate school purposes, the courts have insisted that there be a nexus between the teacher's behavior and an effect upon the school. Thompson v. Southwest Sch. Dist., 483 F.Supp. 1170 (W.D. Mo. 1980). The Respondent has presented no evidence that Brown experienced disciplinary problem in the classroom nor was there evidence of a hostile atmosphere undermining her authority.

Reasonable Basis for Referral-The lower courts did not consider whether HISD had a 'reasonable basis' for referring Brown. The Respondent created another new issue and claimed that the "reasonable basis for referral" issue is not a legally cognizable claim. (Brief Opposition,

p. 2). Authority indicates that if HISD did not have a reasonable basis for referral, then constitutional infirmity is present. The 1st Circuit wrote "A school committee, therefore, may justifiably compel a teacher or administrator to submit to a psychiatric examination as a condition of continued employment if the committee has reason to believe that the teacher or administrator may be jeopardizing the welfare of students under his or her supervision." Daury v. Smith 842 F.2d 9 (1st Cir. 1988). How did Brown's supposedly 'mental disorder' affect her classroom behavior? How were Brown's teaching performance detrimental to students or school? **All authority show that Brown's alleged teacher's performance must have effect on the school or students.**

Liberty Interest (Brown's Brief pp. 10-12); (Tr. pp. 18, 97; pp. 236, 238, 240, 242)

What specifically is or what was Brown's mental disorder? (Brown's Brief pp. 11, 28, 31, 35). This mental illness or stigma placed on Brown has done her grievous harm. Brown has not been able to defend against such a

damaging label. No party including the 5th Circuit has identified Brown's mental illness. Brown deserved even more than minimum due process procedures when she was denied her liberty. What a horrible label especially when not supported by fact!

Judge Gurfein, writing for a unanimous panel, concluded about Plaintiff Lombard the following:
"he was deprived of his reputation as a person who was presumably free from mental disorder. Without his being given the right to confront witnesses, . .This is not only a finding but a stigma. If it is unsupportable in fact, it does grievous harm to petitioner's chances for further employment, as indeed the record demonstrates, and not only in the teaching field. For that reason he was entitled to a full hearing. . .A serious constitutional question arises if he has had no opportunity to meet the charge by confrontation in an adversary proceeding." Lombard v. Board of Education of City of New York, 502 F.2d at 637, 638 (2nd Cir. 1974).

HISD stigmatized Brown by removing her from the classroom midyear. Many employers are skeptical of Brown and wonder why HISD did not wait until the end of the year. What did Brown do that was so detrimental to warrant a midyear removal or termination? After all, Brown remained on the Lee campus almost 2 months after the initial referral. This midyear removal has made it very difficult for Brown to obtain comparable employment.

(Brown's Brief p. 12); (Tr. p. 97) A pretermination hearing was required. Prospective employers were told of Brown's 41 'sick' days. Brown wrote "HISD tells future employers about (Plaintiff) tak. g 41 days of sick leave, this stigmatizing information is false and misleading. Plaintiff was forced to take those 'sick' days" (Tr. p. 242). Under these principles, petitioner's midyear dismissal implicated a protectible liberty interest. Vanelli v. Reynolds School Dist. No. 7, 667 F.2d 773 (9th Cir. 1982).

Jones had a security guard to watch Brown as she retrieved her essentials after the coupe. Students and other teachers witnessed the security guard watching and guarding Brown after Jones without giving her notice told her to leave the campus. Security guard's presence implicated Brown was dangerous. (Tr. pp. 12, 92, 237); (Brown's Brief p. 13). What did the other teachers and students think and who did they tell?

Conflicting Psychiatric Reports (Brown's Brief pp. 7, 29, 37); (Tr. pp. 4, 10, 17, 27, 35, 95, 96, 240). Neither the lower courts or the Respondent addressed the conflicting psychiatric reports issue and Robinson's negligence. These issues have not been put to rest. A

credible psychiatric recommendation endorsed by two other psychological professionals recommended Brown's immediate reinstatement. Conversely, only one negligent psychiatric report (Tr. pp. 38, 261) recommended Brown's removal. (Brown's Brief pp. 4, 7, 25, 30, 75, 95, 96, 111)

Robinson failed to use safeguards such as psychological testing, more than one observation, or even a standard such as the DSM III-R. Brown's expert witness, Dr. John Wade, who used safeguards such as the DSM III-R, psychological testing, and other psychological professionals opinions, recommended that Brown be reinstated (Tr. pp. 70, 75, 96, 185, 242,, 255). The 5th Circuit erred in making all inferences in favor of the defendant-party HISD requesting summary judgment.

The Respondent and the lower courts failed to address the motive/intent issue. Did HISD have a reasonable basis in referring Brown? No, HISD's motive and intent was simply to unlawfully terminate Brown. Why did Dr. Glass and HISD reject Dr. Wade's recommendation and accept the negligent evaluation of Dr. Robinson? Why was Robinson and not HISD school board invested with such authority to remove Brown? Robinson only saw Brown on

one occasion. Glass arbitrarily claimed to have rejected Dr. Wade's recommendation because he made it solely on Brown's account. This is contrary to Daury. But we saw where Daury was immediately reinstated even with his doctor basing his opinion on only Daury's account. Daury v. Smith 842 F.2d 12 (1st Cir. 1988). The 11th Circuit found no problem in Daury's doctor basing his evaluation only on Daury's account. Recall that HISD removed Brown based only on an incompetent evaluation conducted by Robinson. Why didn't Glass challenge Robinson's negligence of no testing or other safeguards? Other HISD employees that have been referred and removed had psychological testing. Glass actions are suspective; her refusal to recommend reinstatement for Brown was surely arbitrary and capricious. Why didn't the court question HISD's motive or intent? HISD's decisions to refer Brown and to reject Dr. Wade's recommendation and to accept Robinson's questionable evaluation presented genuine issues of fact as to the employer's motive and intent that should decided by the factfinder at a trial on the merits. Jones v. Western Geophysical Co. of America, 669 F.2d 280 (5th Cir. 1982). The 5th Circuit stated that motivation and intent can only

be proved through circumstantial evidence, determinations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of the factfinder. 5th Circuit had made it clear that summary judgment is "likewise an inadequate procedure for sorting out nebulous questions of motivation" Honore v. Douglas, 833 F.2d at 569 (5th Cir. 1986). Summary judgments have a place though they are not appropriate "where motive and intent play leading roles" The White Motor Company v. United States 372 US 253, 9 L Ed 2d 738. The district court-Judge Harmon never mentioned Dr. Wade; but the 5th Circuit does acknowledge Dr. Wade's recommendation, but failed to acknowledge the conflicting inferences. Did the lower courts reject Wade's report or were the courts being partisan? The genuine issue of material fact consisting of conflicting psychiatric reports cannot be settled in a summary judgment forum.

Equitable Tolling & Section 1983 -Brown has argued that equitable tolling was in order so that Brown could receive the protection of Title VII. Zipes v. Trans World Airlines, Inc. 455 U.S. 385; 102 S.Ct. 1127 (1982) Despite the district court's clerk's error with the receipt of

Brown's right-to-sue letter (Brown's Brief p.18) (Tr. pp. 4, 6, 10) and uncontrollable problems with two previous/hired attorneys, the lower courts failed to even consider equitable tolling as some Supreme court cases dictate. Brown has alleged that the lower courts have been too harsh and stringent in denying Brown the protection of Title VII, Section 1981, and Section 1983. Brown proved her entitlement to protection. (Petition Writ, pp. 50-55) Is a summary dismissal in order? There just has not been even the appearance of justice.

CONCLUSION-HISD has unconstitutionally denied Brown her blessed God-given and American opportunity of liberty to work in her profession. Brown has provided HISD 3 psychological professionals' recommendations calling for reinstatement to one negligent recommendation.

The Fourteenth Amendment recognizes "liberty" and "property" as coexistent human rights and debars the states from any unwarranted interference with either. Coppage v Kansas (1915) 236 U.S. 1, 59 LE d 441. The constitutional requirement of due process in safeguarding the liberty of the citizen against deprivation through the action of a state was held to embody the fundamental

conceptions of justice which lie at base of the civil and political institutions in the United States. Kelly v Johnson, 47 LE d 975 (1976).

The 5th Circuit stated "Ms. Brown's calling the police apparently precipitated the referral to Health Services" (Petition Writ, p. A-4). Even though the 5th Circuit acknowledge a retaliatory motive; nevertheless, this circuit affirmed summary judgment for the respondent.

Pickering v Board of Education (1968) 391 US 563, 20 L Ed 2d 811 dictates that the teacher's exercise of right to speak on issues of public importance could not furnish the basis for his or her dismissal which would violate the teacher's right to free speech. Brown's case could have a very chilling fact on teachers around the country. Teachers will be afraid. Petitioner Brown prays that this Honorable Supreme Court defends her rights as an American citizen and realizes she is a child of the King. Brown is respectfully asking for summary dismissal or for Petition for Writ of Certiorari to be granted. Either one could set Brown loose; she is hanging on indefinite medical leave. Brown is appreciative for time given to her case.

Lawyers grow reluctant to take job bias cases

By STEVEN A. HOLMES
New York Times

ALBANY, Ga. — John Henry Smith Sr., a black employee of the Dougherty County Health Department, wanted to sue his employer with a claim of racial bias when he was passed over for a promotion.

But, like an increasing number of people who want to file such suits, he could not afford the upfront cost of a lawyer and could not find one willing to take his case on a contingency basis.

He tried several lawyers in Albany, Ga. Then he tried in Athens, Atlanta, Columbus and Macon. The last one turned him down two weeks before the statute of limitations on his case was to run out.

Frantic, Smith decided to represent himself, though he is a high school dropout with a General Educational Development certificate. So far, by spending late nights in the local courthouse library, reading law books, Smith has managed to file the necessary court papers.

"It takes a whole lot of time 'cause you don't know what you're doing," he said. "But you kind of educate yourself as you go along."

As the nation wrestles intellectually and politically with the issue of civil rights, the legal system appears to be growing increasingly inhospitable toward individual race and sex discrimination cases.

Lawyers more and more are turning away such cases, say experts in employment law and lawyers representing plaintiffs and employers.

They say the cases are time-consuming, difficult to win and bring far less money than other civil litigation like personal injury suits, which permit punitive damages.

Lawyers say, moreover, that they face increasingly conservative judges who are bored by, if not downright hostile to, such cases.

While much of the evidence is anecdotal, a survey conducted in May by the National Employment Lawyers Association, a group made up of about 1,000 lawyers for plaintiffs, found that 44 percent of its members rejected more than 90 percent of the job-discrimination cases that had been brought to them.

Last year, a committee of lawyers and judges appointed by Congress to study the federal court system noted that the monetary stakes in some job-discrimination cases might be so small that "even with the potential to recover attorneys fees, claimants sometimes find it difficult to litigate in federal court because they cannot find counsel to take their cases."

Sometimes, but not often, plaintiffs who cannot find lawyers receive court-appointed counsel. Sometimes they then elect to represent themselves, though they tend to be unschooled in the legal complexities.

"They're getting killed in court," Dallas civil rights lawyer Jeanette Johnson said of the poor blacks and women who represent themselves. "It's like sheep to the slaughter."

Most often, experts say, those who seek to bring such cases simply abandon the thought of getting any redress in the federal courts.

"What happens is that they end up not being able to enforce their rights," said Lex Larson, president of Employment Law Research, a North Carolina concern that publishes manuals on labor law. "They go out and find another job, and forget the whole thing."

Experts say the growing reluctance of lawyers to take on job-bias claims is a trend that was intensified by a number of Supreme Court decisions making it harder for plaintiffs to bring such cases.

A bill to reverse these decisions has been stalled in Congress by a dispute over whether it would compel employers to adopt hiring and promotion quotas.

Many lawyers say they are hampered by two high court decisions.

The first, in 1982, limited their ability to bring large and potentially lucrative suits on behalf of whole classes of plaintiffs; the second, in 1988, virtually barred them from winning large monetary awards in race-discrimination suits, except those involving hiring.

Plaintiffs' lawyers also say they end up representing small individual claims brought by poor or working-class blacks or women who often cannot pay their normal rates. If they prevail, they often end up squabbling with judges over how much the losing party must pay them in fees.

"It's extremely difficult to earn a living in employment discrimination, virtually impossible," said Martha Pearson, an Atlanta lawyer.

EXHIBIT #1